90-183

No. _____

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

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ROBERT A. GOODEN,

Petitioner,

v.

TOWN OF CLARKTON, N.C., et al.,

Respondents

****

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

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Questions Presented

I. Whether the substantive component of the Fourteenth Amendment's Due Process Clause affords protection against a multi-year course of municipal misconduct consisting of a brutal beating of Petitioner by a municipal agent, electronic eavesdropping, continuously stigmatizing defamation, an arrest and unreasonable seizure admittedly with "no evidence," a frivolous lawsuit against Petitioner, express threats of a planned future assault and battery, imposition of building permit requirements not imposed upon others similarly situated, an admittedly "malicious" condemnation, and direct admissions by City Council that "corrective" action was needed but was

not employed to prevent further governmental attacks upon Petitioner?

A. Whether one must possess a direct property interest in order to be afforded substantive (as compared with procedural) due process protection?

II. What standard of proof is employed to determine whether substantive due process is contravened under the "arbitrary and capricious" and under the "shocks the conscience" tests?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

Petitioner Robert A. Gooden respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit

entered in the above-entitled proceeding on March 7, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit and the denial of rehearing is reprinted in the Appendix hereto, at page 1A, infra. The opinion of the U.S. District Court for the Eastern District of North Carolina is reprinted in the Appendix hereto, at page 24A, infra.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fourth Circuit was issued on March 7, 1990. The Fourth Circuit denied rehearing and rehearing en banc on March 30, 1990. By order dated June 13, 1990, Chief Justice William Rehnquist extended

Petitioner's time for filing this Petition for a Writ of Certiorari to and including July 30, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner Robert Gooden filed this constitutional and tort action on June 15, 1987 against the Town of Clarkton, North Carolina and several town officials. The Honorable F. T. Dupree, Jr., U.S. District Judge, issued an order on August 29, 1988, granting summary judgment to defendants on all of plaintiff's constitutional claims and on several tort claims. Petitioner's claims relevant to this Petition include substantive due process deprivations involving a brutal beating, a "bad arrest," stigmatizing defamation, an admittedly "malicious" condemnation, an arbitrary and malicious permit denial, and expressly planned threats of a future beating by a municipal agent. The totality of the

governmental conduct is both arbitrary and shocking to the conscience.

The remaining tort claims against individual defendants Baysden (municipal employee) and Hall (municipal building inspector, law enforcement officer and employee) were tried before Judge Dupree and a jury. On October 20, 1988, a total verdict of $85,002.00 was returned for the Petitioner with the jury finding for the plaintiff on all fourteen issues with express findings of malice and punitive damages on each claim. Defendant Baysden was found liable for assault and battery, slander, and malicious prosecution. The district court required Gooden to elect a remedy between slander and intentional infliction of emotional distress on his claims against Hall, and the jury

returned a verdict on Gooden's intentional infliction claim against Hall for $20,000 in compensatory and $10,000 in punitive damages. However, on December 22, 1988, Judge Dupree set aside the verdict against Hall by granting Hall's motion for judgment notwithstanding the verdict, and alternatively, for a new trial.

Petitioner appealed from the trial court's summary judgment and JNOV and new trial orders seeking reversal and a remand for trial on plaintiff's claims of substantive due process, equal protection, unreasonable seizure, intentional infliction of emotional distress, and negligent retention of employees against all defendants.

On March 7, 1990, the Fourth Circuit affirmed the trial court, in essence holding that Petitioner was not

entitled to protection since Petitioner had no legitimate property interest in the building permit sought by Petitioner. The Fourth Circuit failed to address or decide many of Petitioner's essential issues on appeal. For instance, the Fourth Circuit failed to address Gooden's argument that: (1) a property interest is unnecessary for substantive, as compared with procedural, due process protection; (2) Petitioner possessed both property and liberty interests in the condemned business and in the building permit; (3) that Petitioner possessed a liberty interest in his bodily integrity, his reputation, his business, and his application for a building permit. The Fourth Circuit failed to analyze any aspect of Gooden's several substantive due

process claims under the "arbitrary and capricious" or the "shocks the conscience" tests. Rehearing and rehearing en banc was denied by the Fourth Circuit on March 30, 1990.

This case demonstrates that tyranny is alive in America and that substantive due process is a necessary last line of protection against serious governmental harassment of individuals and businesses. This case involves the most egregious multi-year scenario of sadistic misconduct, much of which has already been proven in violation of both criminal and civil laws, and expressly admitted by defendants themselves. At oral argument before the Fourth Circuit, Judge Phillips observed that Clarkton's building inspector "took dead aim on another human being [Petitioner] to hurt him,

to hurt his feelings, to hurt his pocketbook." (Transcript of oral argument at 40). When government takes such dead aim on an individual, substantive due process protection must be available to combat such government oppression. Interestingly, Judge Wilkinson even questioned the very basis of judicial review when he observed that "there may be a lot of people in public office . . . who pain us all. But the question is, is the judicial branch -- is judicial recourse the proper one?" (Transcript of argument at 66.)

B. FACTS

1. Lee's Grill and The 1982 Condemnation

Petitioner Robert Gooden (hereafter Gooden) was an actor residing in Los Angeles who began to make frequent and extended visits to his hometown of Clarkton, North Carolina in the early 1980's when his father became seriously ill with cancer. As a result of being away from his area of employment, Gooden needed to earn income, therefore he discussed with his parents his hope to start a restaurant business in "Lee's Grill." (Gooden Dep. Vol. II at 54). In the spring of 1982, Gooden leased Lee's Grill from his parents and then extensively renovated and began to operate Lee's Grill. (Gooden Dep. Vol. II at 51, 55, 59). (See Gooden's N.C.

Sales and Use Tax Report and Gooden's privilege license for Lee's Grill for 1982-83. JA 237-38).[1] Gooden expended substantial resources of his own in renovating Lee's Grill by making physical improvements to the property and by installing various new equipment in the business. Gooden then managed and carried on a typical small restaurant business. (Gooden Dep. Vol II at 49). Gooden "restored it [Lee's Grill], bought the equipment, stocked it, and opened it up." (Gooden Dep. Vol. II at 51). The restaurant business in Lee's Grill was owned exclusively by Gooden. On September 15, 1982, Gooden was the operator of Lee's Grill.

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[1]The JA references herein refer to the Joint Appendix on file with the Fourth Circuit.

On September 15, 1982, the kitchen area of Lee's Grill was damaged by fire and the Clarkton Fire Department was called to extinguish the fire. Among those attending the fire on September 15 was defendant W. A. Hall who serves as the building inspector and de factor town manager for the Town of Clarkton. (See Dep. of Clarkton Police Chief Ralph Smith at 7-8, 11; JA 152-53, 105). Hall observed part of the interior of Lee's Grill on September 15 and condemned it on that very same day. (Hall Dep., Vol II at 35, 102; JA 134, 275). Hall only performed a cursory on-the-spot inspection of Lee's Grill. Hall was unable to get in all portions of Lee's Grill because a room was locked shut, and it was not at all damaged by fire. (Gooden Dep. Vol. II at 139-40, 79, 144; JA 122-23).

In order to justify his condemnation, Hall gave deposition testimony that Lee's Grill was more than 50 percent burned.[2] When asked how he arrived at his figure, Hall explained that he was just "kind of eyeballing it." (Hall Dep. at 39; JA 136). Hall even admitted that he did not try to make his damage assessment specific, rather he "just got it over 50" percent. (Hall Dep., Vol. I at 39-40; JA 136-37). Hall did not perform any tests as to the structural or other qualities of Lee's Grill. (Hall Dep., at 40; JA 137). Rather, without application of standards, Hall arbitrarily condemned Lee's Grill on

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[2]The North Carolina Building Code provides that a building must be over fifty (50) percent damaged of its physical value in order to be condemned.

the spot within hours of the fire. Clarkton Town Commissioner Wade Tart testified that **the condemnation of Lee's Grill "was through malice" on Hall's part** (Tart Dep. at 11; JA 316).

Subsequently, Lee's Grill was examined by Bob Prichard who is an expert in the field of fire damage. Mr. Prichard gave deposition testimony that even the kitchen/dining area of Lee's Grill was damaged less than 40 percent. Prichard's analysis reveals a room-by-room specific percentage of damage to Lee's Grill. Three of the rooms were not at all damaged. Two rooms were five percent damaged. The office was ten percent damaged. The only area that was significantly damaged was the kitchen area, which was forty percent damaged. The totality of fire damage to Lee's Grill was 19.4

percent, far from the alleged total destruction by Hall.

2. Gooden's Novel

Gooden later discovered through Clarkton Police Chief Ralph Smith that W. A. Hall had an ulterior motive and purpose in arbitrarily and capriciously condemning Lee's Grill. Shortly before the fire and condemnation in 1982, Gooden authored a novel. Gooden hired Hall's daughter to proofread his novel. Hall's daughter was not given any formal credit in the book itself and Hall consequently became upset. (Smith Dep. at 39; JA 169). Hall developed "bad blood" for Gooden. (Affidavit of Ralph Smith; JA 105).

3. Events of 1985: Recondemnation, Arrest, Civil Suit, Slander

In 1985, Gooden began to use the several totally undamaged portions of Lee's Grill for storage and some occasional light work and recreation. Gooden continued to use several portions of Lee's Grill until June 12, 1985, when Hall again condemned Lee's Grill.

On or about June 12, 1985, Clarkton Chief of Police Smith contacted Gooden and ordered that the building be demolished within 60 days. (See Affidavit of Ralph Smith; JA 105). Gooden started dismantling a small shed attached to the rear of Lee's Grill. Gooden then took some of the scrap boards from Lee's Grill across the street to a mobile home park owned by Gooden, where he made a small screened

porch for one of the mobile homes. Hall then served Gooden with a stop-order commanding Gooden that: "You did not have a permit to move the building and you are to stop construction on the building." (JA 382). Hall's stop-order clearly did not comply with the requirements of the N.C. Building Code, Section 105.8. When served with the stop-order, Gooden was sweeping and cleaning across the street from Lee's Grill. (R. Smith Dep. at 17-18; JA 156-157). When served with the stop-order, Gooden "did exactly what I understood the stop-order to say. I did no - no work, no construction on the building." (Gooden Dep. Vol. II at 171; JA 127). Gooden complied with both the demolition order and the stop-order but was still arrested. Gooden's activities in dismantling the shed was

expressly in response to official demolition orders from the Clarkton Chief of Police that demolition must be complete within 60 days pursuant to Hall's condemnation. (JA 105; Gooden Dep. Vol. II at 154, 155, 159; JA 124-26).

4. Gooden's Arrest of June 20, 1985

Hall procured a warrant for Gooden's arrest alleging a violation of N.C.G.S. 160A-417. Hall procured this warrant without having any evidence to substantiate the alleged violation. When later asked by the Assistant District Attorney: "do you have any evidence at all that that building was moved or reconstructed?" Hall responded: "No." (Dep. of Assistant District Attorney Thomas Hicks, at 25; JA 176).

5. The June 1985 Recondemnation of Lee's Grill

When Hall recondemned Lee's Grill in June 1985, he purported to grant the procedural due process protections associated with a condemnation. A sham hearing was held on June 21, 1985, even though Hall's letter of June 12, 1985 indicated that he had already condemned the building. Hall presented some information, but he admittedly left even before the sham hearing was over (Hall Dep., Vol. II at 43). When asked the purpose of having a hearing on June 21 since Hall had already condemned the building, Hall stated: "I don't know." (Hall Dep., Vol. II at 39; JA 143). Hall testified there was nothing that anybody could have done at that hearing to change his mind about the

condemnation. (Hall Dep., Vol. II at 39; JA 143). Hall's mind was made upon the day of the fire. Id. The Clarkton Town Attorney and Attorney Don Viets later worked out a written solution to the condemnation controversy, but Hall refused to go along with the prepared written agreement reached between the attorneys. (Viets Dep. at 18, 33, 34; JA 231, 233-34).

In discussing the condemnation of Gooden's business by Hall, Mayor Meshaw informed an attorney in another constitutional case against Clarkton, Carpenter v. The Town of Clarkton (EDNC, 86-90-CIV-7) that: "now if anybody wanted to sue the town on that, they've got a legal leg to stand on that. They could bust our butt on that board action, but nobody's chose that route to go." (JA 266) Thus, even

Clarkton's Mayor recognized the illegality of Hall's condemnation.

6. Clarkton's Civil Suit Against Gooden Filed June 25, 1985

Before the criminal charge against Gooden was heard, on June 25, 1985, the Town of Clarkton filed a civil suit (JA 100-02) against plaintiff seeking demolition of Lee's Grill, the very act that Gooden had begun on June 12, 1985 pursuant to orders from the Chief of Police, for which Gooden was arrested. Although the civil suit was verified by Hall, he testified that he did not read the lawsuit before he signed it and he really did not know that the matters contained therein were true even though Hall swore to the truth thereof. (Hall Dep. Vol. II at 83-85). After the criminal charge against plaintiff was

dismissed for insufficient evidence (see discussion infra) Clarkton did not prosecute the civil action. Gooden's interest in Lee's Grill was so legitimate, that Clarkton sued him as the owner.

7. Disposition Of The Building Charge Against Gooden On June 26, 1985

On June 26, 1985, the criminal charge against plaintiff for failing to obtain a permit was calendared in Bladen County District Court. Assistant District Attorney Thomas Hicks met with Hall, Clarkton Town Attorney Cliff Hester, and Clarkton Police Chief Ralph Smith to discuss the criminal charge. (Hicks Dep. at 23, JA 174; Ralph Smith Dep. at 28, JA 162). Chief Smith indicated that "Hall was going to hang him [Gooden] in court."

(Smith Dep. at 24; JA 159). Smith explained that Hall "was all fired up about it ... very aggressive," (Smith Dep. at 25; JA 160). Smith indicated that he had never seen Hall that aggressive about anything. Id. Chief Smith testified that Hall indicated that he had charged Gooden with the "wrong violation" (Smith Dep. at 28; JA 162) but that Hall wanted to go through with the prosecution of Gooden "very much so." (Smith Dep. at 27; JA 161). Even knowing he was wrong, Hall vowed to prosecute. The District Attorney testified that even the Clarkton Town Attorney Hester "stated that they had charged him [Gooden] with the wrong violation." (Hicks Dep. at 21; JA 173).

Chief Smith explained that "Hall had a grudge against him [Gooden]."

(Smith Dep. at 39; JA 169) and that Hall referred to Gooden as "a son of a bitch." (Smith Dep. at 37; JA 168). Chief Smith, explained the background of Hall's vendetta against Gooden before the arrest:

> Hall called him [Smith] at 11:00 and 12:00 at night to ask his (Smith's) definition of a structure ... Hall defined 'structure' as two boards with a nail in them, and that was how he was going to get that S. O. B. (Bobby Gooden). (Affidavit of Smith; JA 105-06).

Hicks and Chief Smith explained Hall's conduct in discussing the criminal charge against Gooden. Hicks asked Hall: "do you have any evidence at all that that building was moved or reconstructed?" Hall responded: "No." (Hicks Dep. at 25; JA 176). Even Hall later admitted in deposition testimony that he did not have the requisite

evidence. (Hall Dep. Vol. I at 78). Since Hall had no evidence at all to prove the criminal case, Hicks informed Hall and Smith that he was going to dismiss the case. Smith explained:

> Hall threatened to get [Gooden] on several other charges if Hicks didn't prosecute. Hicks refused and Hall threw down his regulation book in anger and left. (Smith Affidavit; JA 105-06).

W. A. Hall's campaign of revenge and retaliation against Gooden is explained in the affidavit of Andrew Chavis, who has been employed by the Town of Clarkton for fourteen years and who works regularly with Hall. Chavis explained:

> Mr. Hall even bragged before the trial of beating Bobby Gooden in court. When it was dismissed he was mad at Bobby .... It's pretty clear that Bobby Gooden is being singled out. I have never heard of anybody in Clarkton being

> arrested for building a screen porch or whatever that building permit situation is about, except for Bobby Gooden. The building permit requirement is not even strictly enforced, except with Bobby Gooden. People build things around here all the time without permits and nobody cares .... Nobody's ever stood up to W. A. Hall before, and on that wrong condemnation, Bobby Gooden did. I think that's why they have a mean grudge against Bobby Gooden and that's why they are out to ruin his reputation ... Mayor Dan Meshaw seems to be the worse. He knows what Hall and Baysden are doing, but he's doing nothing about it. If anything, he's helping Mr. Hall and Mr. Baysden get Bobby Gooden. (Chavis Affidavit dated July 13, 1987; JA 109).

Hall was so angry after having lost in court, that on the same day, June 26, 1985, for the first time, he executed a "condemned sign" which was posted on Lee's Grill that day. (JA 99). Hall even tried to involve the

N.C. Attorney General (JA 89) in the condemnation, along with the N.C. Commissioner of Insurance, even though the Commissioner of Insurance had no jurisdiction to hear condemnation matters. (See Affidavit of N.C. Deputy Insurance Commissioner, Lee Hauser, and accompanying letters. JA 85, 95). Finally, Hall wrote to the N.C. Building Code Council further alleging three separate criminal violations by Gooden. (JA 92).

8. Slander By Municipal Agents

After Hall grew even more enraged with Gooden, Hall and his subordinate, Tommy Baysden, began to defame Gooden by imputing him with the most heinous conduct including the commission of felonies (N.C.G.S. 14-177, crime against nature; JA 375, and N.C.G.S.

14-190, promoting pornography; JA 107) and by labeling plaintiff as a homosexual. Hall began publishing slander about Gooden shortly after June 26, 1985, when the criminal case Gooden involving building without a permit was dismissed for insufficient evidence. Hall stated to Clarkton resident Carlton Priest that Gooden had engaged in a crime against nature with District Attorney Hicks in order to get his criminal case dismissed. "Bobby went over there and sucked the district attorney's dick and got the thing thrown out ... he beat me this time ... but my day'll come." (JA 375). Hall's numerous publications were verified by countless witnesses at trial, which were accepted by the jury. Only the defendants and their agents testified

that they had somehow "heard" that Gooden was homosexual.

Later in August 1986, Baysden attended a public Clarkton town meeting with numerous citizens present and openly referred to Gooden as a "queer" in official discussions with the Town Board about Gooden's building. (Dera Butler Dep. at 23-25; JA 227-28). Ms. Butler explained that Baysden "smiled" while he called Gooden a queer and told the audience that Gooden was showing pornographic movies at Lee's Grill. "The whole room was shocked," yet the Mayor and City Council did not question Baysden's conduct. Id. On the defamation action which was tried, the jury found in Gooden's favor on every issue assessing both compensatory and punitive damages. Defendants' argued

truth as a defense, which was categorically rejected.

9. Clarkton Mayor Meshaw Targeted Gooden for Malicious Harassment

Deposition testimony further confirmed that Clarkton Mayor Dan Meshaw attempted to have Gooden charged with arson. Even though Lee's Grill had burned in September of 1982, Mayor Meshaw directed Chief Smith to pursue the arson of the building in 1985. (Smith Dep. at 35; JA 167). Mayor Meshaw specifically wanted Smith to reopen the fire investigation of Lee's Grill. (Smith Dep. at 33; JA 165). Smith testified that "Dan [Meshaw] left me with the impression that Bobby [Gooden] had set the building on fire." (See Smith Dep. at 34; JA 166).

Mayor Meshaw maliciously exercised his power by directing Clarkton Chief of Police Ralph Smith: "see what you can dig up on Gooden." ;(Smith Dep. at 35 and Affidavit; JA 106, 167). Smith interpreted Meshaw as wanting to reopen the fire investigation so as to bring a charge of arson against Gooden. (Smith Dep. at 45; JA 170). Chief Smith's investigation found no evidence suggesting that Gooden had committed arson and Smith informed Gooden of this. (Gooden Dep. Vol. II at 76). Further, after Chief Smith and W. A. Hall had been to court on the building permit violation involving Gooden, Hall even accused Gooden of arson. (Smith Dep. at 46; JA 171).

10. New Clarkton Board Rescinds Hall's Actions And Orders Hall to Issue Gooden A Building Permit But Hall Refuses to Comply

Hall's condemnation became a very controversial public issue in Clarkton. On April 14, 1986, the board of commissioners of the Town of Clarkton passed a motion "that any action taken by W. A. Hall, Building Inspector, or any other person of the Town of Clarkton relative to condemnation of any building or structure be rescinded until further study can be made by the council." (JA 274, 271). After the condemnation of Lee's Grill was rescinded by the Clarkton town board, Gooden requested that W. A. Hall issue a building permit such that he could make repairs to the building, but Hall vehemently refused. (JA 257-59). Hall refused to issue the permit even though

the Clarkton Board ordered Hall to issue the permit. (Meshaw Dep. at 161; JA 200; Hall Dep. Vol. I at 80; JA 365).

On May 12, 1986, Gooden contacted Hall requesting a building permit for Lee's Grill. Hall refused purportedly because Hall refused to accept the rescinding of the condemnation. On the next day, May 13, 1986, when plaintiff again requested a building permit, and Hall reiterated: "I can't give you a building permit" but Hall later went on to explain that an architectural blueprint would have to be submitted. (JA 258-59). In a two minute conversation, Hall told Gooden of three conflicting requirements, none of which Hall ever imposed on numerous others similarly situated.

Hall's course of conduct against Gooden remained unchanged even after the Clarkton Board rescinded Hall's condemnation. However, at that point, Hall began to add the new conditions of plans and blueprints (not imposed on any other applicant) as a subterfuge. Gooden appeared before the Clarkton Board and pleaded with them over all of the harassment, particularly by Mayor Meshaw and Hall. Mayor Meshaw challenged Gooden to "sue the town." (Meshaw Dep. at 139; JA 199).

11. Clarkton Selectively Enforced The Building Code Against Gooden By Issuing Building Permits To Others Without Plans And By Affording Others An Opportunity To Repair Before Condemnation

As explained by longtime Clarkton employee Andrew Chavis: the Clarkton "building permit requirement is not

even strictly enforced, except with Bobby Gooden. People build things around here all the time without permits and nobody cares..." (JA 109). Clarkton has granted building permits to others whose buildings were substantially more extensively damaged. The building owned by Alexander Hester was totally destroyed. (JA 297-99 and Hall Dep. Vol. I at 53; JA 358, Vol. II at 131-32; JA 372-73). The only thing remaining of the Hester building is the exterior walls - the entire interior and roof was gutted. (JA 372). Nevertheless, Hall issued a building permit to Hester on March 12, 1986 (JA 286) while Hester's building was condemned and admittedly 100 percent burned. (JA 372). But Hester was not required to and did not submit a blueprint when Hall issued Hester's

permit. (Hall Dep. Vol. I at 53; JA 358). Hall freely issues building permits without any plans, blueprints, or specifications to anybody but Gooden.

The Town of Clarkton has many structures which are extremely dilapidated, without walls, roofs, etc., which are far inferior to Lee's Grill. (JA 302, 304-05). The Town of Clarkton has failed to condemn these other structures but condemned Lee's Grill arbitrarily and ordered immediate demolition. Hall regularly fails to condemn true health and safety hazards in Clarkton yet he condemned Lee's Grill in spite of testimony of fire damage expert Bob Prichard who concluded that Lee's Grill was not nearly sufficiently damaged to be condemned. Lee's Grill was admittedly

condemned "through malice" on Hall's part. (Tart Dep. at 11; JA 316).

12. August 12, 1986 Assault and Battery

On August 12, 1986, the malicious course of conduct orchestrated by Mayor Meshaw, Hall, Baysden, and other Clarkton officials against Gooden erupted in brutal violence when Clarkton unleashed its agent to attack Gooden. Tommy Baysden, who is 325 pound employee of the Town of Clarkton, physically attacked Gooden while on the job by striking Gooden about the head, shoulders, and stomach. The battery necessitated immediate medical treatment by Dr. Don W. Creed, who sent Gooden to the emergency room at the Bladen County Hospital. (Gooden Dep. at 198). Gooden's physical injuries

required continued medical treatment by Dr. Leopold Tuchman, a chiropractor, and subsequently a neurosurgeon. (Gooden Dep. Vol. I at 203-05; JA 115-16). The attack affected Gooden's ability to drive and read due to the neck and head pain. (JA 283).

Town Commissioner Wade Tart observed the entire physical attack by Baysden from fifteen feet away. Tart observed the entire assault from the beginning to the end. (Tart Dep. at 24; JA 192). Commissioner Tart further testified that Baysden's assault upon Gooden was discussed at a Clarkton town board meeting but the Board never did anything about it. (Tart Dep. at 29; JA 319). At one time, the Clarkton town board decided to "retire" and "terminate" Baysden but just never got around to doing it. (Tart Dep. at 30;

JA 196). Gooden secured a warrant charging Baysden with assault. The next day, Baysden retaliated by charging Gooden with assault. Subsequently, Baysden pled guilty to the criminal offense of assaulting Gooden in Bladen County District Court, and the assault charges against Gooden were dismissed by Baysden. (Baysden Dep. at 66; JA 265). Shortly before the assault, on August 3, 1986, Baysden was caught using an electronic eavesdropping device often used by hunters known as a "bionic ear" eavesdropping on Lee's Grill when Gooden and some friends were there. As Baysden was attempting to eavesdrop, Hall, who lives immediately behind Lee's Grill, was observing and supervising Baysden's activities. (Gooden Dep. at 66, JA 114).

12. The Town of Clarkton Failed To Act To Prevent Continuing Harm To Gooden

Although Baysden's attack on Gooden was discussed by the Clarkton Board at a meeting, the Board never did anything about the attack. (Tart Dep. at 29; JA 319). Even after the entire malicious pattern of events against Gooden culminating in a violent physical attack, Baysden has continued to state: "In two years and one month I'll be free to beat the hell out of the damn bastard," in reference to Gooden. See Statement of Clarkton Town Commissioner Cathy McEwen, dated September 27, 1986 (JA 82). Commissioner McEwen considered the assault by Baysden to be a serious matter. (McEwen Dep. at 25-26; JA 211-12). McEwen indicated that she was "concerned" about the future threat.

(JA 220). After hearing Baysden's statement, McEwen went "straight into Mr. Butler's store" to talk with Commissioner Butler about it. Id. Commissioner McEwen explained that she took up with the two other members of the town board Baysden's behavior and "they agreed we needed to do something. We never could agree on what." (McEwen Dep. at 56; JA 222). McEwen discussed the assault of Gooden with the other commissioners who expressed a desire to take some disciplinary action against Baysden. Id. Mayor Meshaw indicated that he was concerned about Baysden's threats to assault Gooden again. (Meshaw Dep. at 103; JA 336). But Meshaw and the Clarkton Board did nothing, and the violence ensued.

Commissioner Roy Butler testified that: "CORRECTIVE ACTION OR

DISCIPLINARY ACTION WAS NECESSARY." (Butler Dep. at 38; JA 205). Commissioner Butler believed that Baysden should have been relieved from his job. (Butler Dep. at 39; JA 206). Butler indicated that Commissioner Tart shared his concerns that Baysden should have been relieved from his job. Id. In Carpenter v. The Town of Clarkton, Baysden gave deposition testimony concerning his assault on Gooden. When asked if he was going to assault Gooden again in two years, Baysden responded: "I probably will." (JA 260). Yet, the Town of Clarkton did nothing to prevent this planned physical attack on Gooden.

Later, the Town of Clarkton enacted a new personnel policy. (McEwen Dep. at 41; JA 210). McEwen testified that there have been over 100 complaints about how Clarkton town

employees treat people. (McEwen Dep. at 24; JA 219). McEwen testified that the new personnel policy was a preventive measure. (McEwen Dep. at 432). Gooden was defamed, arrested, threatened, and beaten. Commissioner Tart was so concerned about municipal misconduct, that at his deposition, he requested that Gooden "have mercy on Clarkton." (Tart Dep. at 45; JA 321).

C. The Fourth Circuit Opinion Below

The Fourth Circuit opinion below only summarily traced the alleged facts but omitted identification of the critical facts concerning the continuous rage of municipal misconduct. Moreover, the Fourth Circuit failed to address all of Gooden's substantive due process claims as the Fourth Circuit erroneously

limited its analysis to Gooden's substantive due process claim premised upon the permit denial. The Fourth Circuit did not analyze the arbitrary condemnation claim; nor did it address Gooden's substantive due process claims premised upon deprivations of Petitioner's liberty interests under the shocks the conscience test.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND NUMEROUS CIRCUIT COURT DECISIONS RECOGNIZING THE APPLICATION OF SUBSTANTIVE DUE PROCESS TO EGREGIOUS FORMS OF GOVERNMENTAL MISCONDUCT.

In Arlington Heights, 429 U.S. 252, 263 (1977), this Court expressly recognized the constitutional right to be "free of arbitrary or irrational zoning actions." This Court has recently breathed new life into

substantive due process. E.g., Daniels v. Williams, 474 U.S. 327, 331 (1986) (the touchstone of due process in the "protection of the individual against arbitrary action of government ... The Due Process Clause ... was intended to secure the individual from the arbitrary exercise of the powers of government"), see id at 337-38 (Stevens, J., concurring), United States v. Salerno, 107 S.Ct. 2095, 2101 (1987) ("substantive due process prevents the government from engaging in conduct that 'shocks the conscience.'"); DeShaney v. Winnebago County Dept. of Soc. Serv., 103 L.Ed.2d 249, 259 (1986) ("the Due Process Clause ... was intended to prevent government 'from abusing [its] power.'")

The lower courts desperately need guidance and instruction from this Court concerning how to apply substantive due process to a pattern or practice of egregious misconduct. In Silverman v. Barry, 845 F.2d 1072 (D.C. Cir. 1988), the court observed that "[t]he Supreme Court has not enumerated a standard by which to determine precisely which state lapses constitute substantive due process violations under 42 U.S.C. section 1983." Since Arlington Heights, substantive due process is a viable means to attack land use and related decisions, but the lower court cases are devoid of a consistent test to be applied.

A. A PROPERTY INTEREST IS UNNECESSARY FOR SUBSTANTIVE DUE PROCESS PROTECTION.

The Fourth Circuit here simply avoided any real substantive due process analysis altogether by requiring a property interest before affording any substantive due process protection. This Court should grant the Writ in order to decide this troublesome question of whether a property interest is required for substantive due process protection. Some cases include general language purporting to require a property interest for all due process claims. This case presents an opportunity to clarify this due process confusion in the circuits.

A compelling line of cases holds that one need not possess a property interest in order to be afforded

substantive due process protection primarily because substantive due process rights are not dependent upon property rights under state law as in the case of procedural due process. Rather, as Justice Powell explained in Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (concurring): "substantive due process right are created only by the Constitution." See Edwards v. Johnson, 885 F.2d 1215, 1219 (4th Cir. 1989) (same). Property interests under state law are not relevant to the doctrinal basis of substantive due process. Certainly traditional property interest analysis is inappropriate for Gooden's substantive due process theories premised upon his deprivation of personal liberty and Clarkton's "shocking to the conscience" conduct."

Those recognized liberty interest theories were argued but were not addressed by the Fourth Circuit.

In Swank v. Smart, 898 F.2d 1247, 1252 (7th Cir. 1990), the Seventh Circuit, speaking through Judge Posner, specifically held that a property interest is unnecessary for substantive due process protection. State law grounded property interests "is relevant to Swank's 'procedural due process' claim - . . . but not to his substantive due process claims." Id.

In Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986), the Tenth Circuit explained: "Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution." Accord Toney-El v.

Franzen, 777 F.2d 1224, 1227 (7th Cir. 1985). In Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988), the Court affirmed a decision finding a substantive due process violation for refusing to issue a building permit. There, the court rejected plaintiff's procedural due process claim because of the lack of a property interest under state law, but the lack of a property interest has no bearing on substantive due process.

In Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988), the court rejected the plaintiff's procedural due process claim for lack of a property interest but held that substantive due process claim was sufficient even without a property interest. Therefore, compelling authority provides that a property interest is unnecessary in

order to obtain substantive due process protection, contrary to the Fourth Circuit's conclusion here. Judge Posner's analysis in Swank is in sharp contrast to the Fourth Circuit's unreasoned conclusion here.

B. GOODEN'S SEVERAL SUBSTANTIVE DUE PROCESS CLAIMS INVOLVE ARBITRARY AND SHOCKING TO THE CONSCIENCE CLAIMS.

Here, Gooden's substantive due process claims are premised upon several distinct bases: (1) an arbitrary and malicious condemnation, (2) an arbitrary and malicious permit denial; and most importantly, (3) the totality of Respondents' conduct is shocking to the conscience depriving Gooden of numerous traditionally recognized liberty interests.

Gooden's theory in this regard established that the entire protracted course of municipal conduct was not only arbitrary, capricious, and malicious, but utterly outrageous and "shocking to the conscience." The jury's finding of extreme and outrageous conduct on the intentional infliction claim against the building inspector illustrates the true extreme nature of Clarkton's abusive misconduct. This "shocking to the conscience" test has been employed in various substantive due process contexts. Perhaps Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) best illustrates this principle. There, the court applied substantive due process in the context of disciplinary corporal punishment in the public schools

enunciating a shock the conscience test.

Metzger v. Osbeck, 841 F.2d 518 (3rd Cir. 1988) followed the analysis in Hall and reversed summary judgment for the defendants on a substantive due process claim. The court held that a substantive due process claim may be established if the "intent to cause harm" is established. "Thus, we cannot deprive plaintiffs of an opportunity to have a jury resolve the issue of Osbeck's intent in their favor." 841 F.2d at 520-21. In his opinion concurring and dissenting, Judge Weis explained that the critical element of the substantive due process claim was "not the nature of the plaintiff's injury, but the manner of the infliction of the injury." Id. at 522.

See Garcia v. Miera, 817 F.2d 650, 653-55 (10th Cir. 1987).

Given the compelling admissions of "malicious" governmental conduct, this case presents a scenario ripe for application of the "shocks the conscience" test. The en banc decision of the Sixth Circuit in Nishiyma v. Dickson County, 814 F.2d 277 (6th Cir. 1987) is instructive. There, the court held that the reckless indifference to risk posed by actions of a sheriff in permitting an inmate to use a patrol car which killed the plaintiff stated an actionable substantive due process claim. Id. at 283. Cf. Bello, 840 F.2d at 1129. In Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986), the Fifth Circuit reversed summary judgment for defendants where the plaintiff alleged a substantive due process

violation arising out of a police chase. The Fifth Circuit reasoned that "[f]actual development in this case could lead to a jury question whether Webb and Allison's car-chasing actions were 'inspired by malice...so that it amounted to an abuse of official power that shocks the conscience.'" Id.

Many of the foregoing substantive due process cases involved a single incident which shocked the conscience. Here, Clarkton has engaged in a protracted course of conduct repeatedly and outrageously pursuing Petitioner for several years. Taken together, Clarkton's conduct is far more egregious than any of these leading cases. This case presents this Court with a ripe scenario to enunciate clearer standards for substantive due process claims.

II. THERE IS A DIRECT CONFLICT BETWEEN NUMEROUS CIRCUIT COURTS CONCERNING THE SCOPE AND APPLICATION OF SUBSTANTIVE DUE PROCESS.

The Circuit courts are hopelessly split on a host of substantive due process issues in land use, permit, and other cases including the critical standard of proof issue. Generally, the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits apply substantive due process to protect "the individual against arbitrary action of government" as mandated by this Court in Daniels and other cases cited supra. The First and Eighth Circuits are generally hostile towards substantive due process, at least as applied to land use matters. But even in those circuits generally hostile to the doctrine, the proof standards are mixed and unclear, and

some cases have recognized substantive due process.

The Seventh Circuit has endorsed the shocks the conscience test for abusive law enforcement investigative tactics. Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) (opinion by Posner, J.). In Brower v. Inyo, 817 F.2d at 545-46 (9th Cir. 1989), rev'd on other grounds, 109 S.Ct. 1378 (1989), the Ninth Circuit applied the shocks the conscience test to a police roadblock. Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) illustrates the contemporary scope of substantive due process protection. There, the court recognized its application where the government exposes an individual to harm by third parties. There, a police officer left a female passenger stranded after arresting the driver for

drunk driving. The passenger was raped. The officer's conduct exposed her to the forseeable harm, thus invoking substantive due process. The Fourth Circuit's position requiring a property interest is in sharp contrast to the holdings of various other Circuit courts. See discussion supra.

In Bello, 840 F.2d 1124, 1129 (3rd Cir. 1988), the Third Circuit held that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." In Brady v. Town of Colchester, 863 F.2d 205 (2nd Cir. 1988), the Second Circuit applied substantive due process to the denial of a building permit as a result of political animus. See Silverman v. Barry, 845 F.2d 1072 (D.C. Cir. 1988) ("a substantial infringement of state

law prompted by personal or group animus, or a deliberate flouting of the law ... qualifies for [substantive due process] relief.") Cf. Benigni v. City of Hemet, 868 F.2d 307, 312 (9th Cir. 1989) (substantive due process claim and verdict upheld for "arbitrary law enforcement activity.").

In Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983), the Sixth Circuit held that the denial of a license because of bias and the desire to avoid competition violates substantive due process. Accord Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347, 1356 (11th Cir.), cert. denied, 463 U.S. 1208 (1983) (imposition of requirements not in the relevant ordinance violates substantive due process). See Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) (applying both shocks the conscience

test and Wilkerson arbitrary and capricious test in an employment case).

The Eighth Circuit has issued palpably inconsistent decisions. In Littlefield v. Afton, 785 F.2d 596, 607 (8th Cir. 1986), the court held that a substantive due process claim could be premised upon an arbitrary and capricious denial of a building permit. Accord Cunningham v. Overland, 804 F.2d 1066, 1069 (8th Cir. 1986) (arbitrary and capricious denial of a merchant's license states substantive due process claim.) But cf. Lemke v. Cass County, 846 F.2d 469 (8th Cir. 1987) (en banc), and concurrence of Judge Arnold, id. at 471.

However, the Eighth Circuit has recognized that substantive due process precludes an arbitrary and capricious discharge of a public employee. Fisher

v. Snyder, 476 F.2d 375 (8th Cir. 1973) (arbitrary, capricious and triviality test employed). Moreover, in Chernin v. Lyng, 874 F.2d 501 (8th Cir. 1989) the Eighth Circuit, relying upon FDIC v. Mallen, 108 S.Ct. 1780 (1988), held that substantive due process even precludes arbitrary government interference with even a private sector at-will employment relation. See Harrah Independent School Dist. v. Martin, 440 U.S. 194 (1979) (implicitly recognizing right to be free from arbitrary and capricious state action.)

The foregoing demonstrates that the compelling weight of authority affords substantive due process protection to plaintiffs like Petitioner Robert Gooden. However, stark differences remain between the circuits concerning the all-important

standard of proof issues, which are often determinative of liability.

III. THE CONFLICTING AND UNCERTAIN STANDARDS OF PROOF FOR SUBSTANTIVE DUE PROCESS CLAIMS PRESENTS A SUBSTANTIAL FEDERAL QUESTION THAT REQUIRES THIS COURT'S ATTENTION

The recent explosion of substantive due process cases in a variety of cases presents troublesome fundamental questions which call for this Court's attention. Most of the cases recognizing or applying substantive due process usually do so summarily with little or no genuine methodological analysis.

Does one apply the arbitrary and capricious test, the triviality test, or the shocks the conscience test? Is the extremely deferential "at least debatable" test sufficient? What proof is necessary in order to satisfy the

appropriate test? Does one apply the equal protection proof factors enunciated in Arlington, 429 U.S. at 266-68? These questions are baffling the Circuit Courts, and as the District of Columbia Circuit recognized in Silverman, it is time for this Court to step in. See McGuinness & McGuinness-Parlagreco, The Reemergence of Substantive Due Process As A Constitutional Tort, 24 New England L.Rev. (1990).

CONCLUSION

Here, Clarkton's multifaceted scheme of malicious misconduct presents a fact pattern whereby this court could treat both the arbitrary and capricious and the shocks the conscience tests, and the property interest dilemma, for the benefit of Petitioner and the lower

courts. Therefore, Petitioner prays that a Writ of Certiorari issue to the Fourth Circuit to review the decision below.

Respectfully submitted,

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APPENDIX

UNITED STATES COURTS OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3630

ROBERT ALLEN GOODEN,

Plaintiff-Appellant

versus

TOWN OF CLARKTON, NC, A municipal corporation; LINDA REVELS; STEVE PRINCE, LAWRENCE MCDOUGALD, Former Commissioners, Town of Clarkton; WADE TART; ROY BUTLER, CATHY MCEWEN, Present Commissioners, Town of Clarkton; W.A. HALL, Building Inspector, Town of Clarkton; RALPH SMITH, Chief of Police, Town of Clarkton; DAN MESHAW, individually and as Mayor, Town of Clarkton; TOMMY BAYSDEN, and their successors in office,

Defendants-Appellees.

No. 89-2019

ROBERT ALLEN GOODEN,

Plaintiff-Appellant

versus

W. A. HALL, Building Inspector, Town of Clarkton, North Carolina,

Defendant-Appellee,

and

TOWN OF CLARKTON, NC, A municipal corporation; LINDA REVELS; STEVE PRINCE; LAWRENCE MCDOUGALD, Former Commissioners, Town of Clarkton; WADE TART; ROY BUTLER, CATHY MCEWEN, Present Commissioners, Town of Clarkton; DAN MESHAW, individually and as Mayor, Town of Clarkton; TOMMY BAYSDEN, and their successors in office; RALPH SMITH, Chief of Police, Town of Clarkton

Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of North Carolina, at Wilmington. Franklin T. Dupree, Jr., Senior District Judge. (CA-87-56-CIV-7).

Argued: October 30, 1989 Decided: March 7, 1990

Before PHILLIPS and WILKINSON, Circuit Judges, and FOX, United States District Judge for the Eastern District of North Carolina sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Joseph Michael McGuinness, SWARTZ & SWARTZ, Boston, Massachusetts, for Appellant. Hoyt Gold Tessener, WOMBLE, CARLYLE, SANDRIDGE, & RICE, Raleigh, North Carolina, for Appellees. ON BRIEF: Marland C. Reid, Gregory Kornegay, Law Student, REID, LEWIS & DEESE, Washington D.C., for Appellant.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

These consolidated appeals arise from an action filed by plaintiff-appellant Robert Gooden against the

Town of Clarkton, North Carolina, and various town officials. Appellant alleges that defendant violated his substantive due process and equal protection rights by refusing to give him a permit to rebuild a condemned structure owned by his parents, and violated his Fourth Amendment rights by arresting him for building without a permit. He also advances various state law claims, among them that defendant Hall's disparaging reference to him as a homosexual was defamatory and constituted the intentional infliction of emotional distress.

We affirm the district court's judgment for defendants both on the constitutional and state claims in this case.

I.

On September 15, 1982, a fire destroyed a wood frame structure owned by plaintiff's parents and known as Lee's Grill in Clarkton, North Carolina. Plaintiff Robert Gooden, a resident of California, was operating Lee's Grill because his father was ill. After the fire, defendant Hall, the local building inspector, condemned the Lee's Grill building because he determined that it was more than 50 percent destroyed. See N.C. State Building Code §§ 102(d)(2) & 105.12 (1984); N.C. Gen. Stat. §160A-426 (1987).

The building remained unused until the spring of 1985 when plaintiff began using it for storage and recreational purposes. Subsequently, plaintiff's mother Gertrude Gooden, who still owned

the building, received a letter informing her of the condemnation and requesting that she appear at a public hearing. Both plaintiff and his mother attended the hearing. Eventually Mrs. Gooden received an approximately $70,000 insurance settlement on the property based upon a determination that it was almost totally destroyed.

On June 20, 1985, Hall obtained a warrant for plaintiff's arrest because Gooden had violated a stop order forbidding him to move or reconstruct the condemned building without a permit. See N.C. Gen. Stat. §160A-417; N.C. State Building Code §105.3(b). Gooden was not incarcerated and was released on his promise to return for trial. The criminal charges were eventually dismissed.

The Town of Clarkton subsequently filed a civil action against plaintiff on June 25, 1985, seeking to enjoin Gooden from performing any further work on the Lee's Grill building, and ordering that it be demolished. An official notice of condemnation was posted on the structure. The condemnation was later rescinded, however, along with all other condemnation actions by any Clarkton official, pending an investigation by the Town Council.

On May 12 and 13, 1986, plaintiff requested a building permit to perform further work on the condemned structure, but submitted no plans for specifications. North Carolina law requires that applicants provide specifications and drawings at the discretion of the Inspection

Department. N.C. State Building Code §105.4(c). Defendant Hall indicated that he would not grant plaintiff's request until plans and specifications were submitted.

On August 12, 1986, defendant Baysden, the town trash collector, publicly assaulted plaintiff by striking him about the head, shoulders and stomach. Plaintiff and Baysden each secured warrants charging each other with assault. Baysden pled guilty to the criminal charges brought against him in Bladen County District Court. The charges against plaintiff were dismissed. The retention by the Town of Clarkton of defendants Hall and Baysden is the basis of plaintiff's negligent retention claim.

Plaintiff brought suit in United States District Court for the Eastern

District of North Carolina against defendants Town of Clarkton and various officials and employees of the town in their individual and official capacities alleging federal and state constitutional claims (denial of the right to due process, equal protection, and freedom from unreasonable seizure) and state tort claims (malicious prosecution and abuse of process, defamation, assault and battery, negligent retention of town employees, and intentional infliction of emotional distress).

The district court granted summary judgment in favor of defendants on plaintiff's substantive due process and equal protection claims and on his claims of unreasonable seizure, malicious prosecution, abuse of process, and negligent retention. The

intentional infliction claim against defendant Hall was tried to a jury which found for plaintiff and awarded $20,000 in compensatory and $10,000 in punitive damages. Subsequently, the district court granted defendant Hall's motion for judgment notwithstanding the verdict. This appeal followed.[1]

II.

Appellant argues that defendants' actions violated various of his constitutional rights and that the Town of Clarkton negligently retained employees Baysden and Hall despite their alleged misconduct. The district court fully considered and rejected

[1]The jury returned a verdict against defendant Baysden for assault and battery, slander, and malicious prosecution, and awarded damages of $55,002. Baysden did not appeal.

these claims and we agree with the court's analysis. Plaintiff's substantive due process and equal protection claims fail because he did not meet the statutory requirements for a building permit. Gooden was neither the owner of the property in question, nor did he submit plans and specifications as required by the North Carolina State Building Code. See N.C. State Building Code §§ 105.4-6 & 302.4. Thus, any denial of such a permit by defendant could not violate Gooden's constitutional rights. It simply cannot be argued that Hall was "arbitrary and capricious" in denying the permit, see Marks v. City of Chesapeake, 883 F.2d 308, 310-11 (4th Cir. 1989), since plaintiff had no legitimate claim to it. Allegations of a denial of due process ring hollow

unless plaintiff possesses some underlying right or interest of which he could be deprived. The equal protection claim amounts to little more than a rehash of plaintiff's due process contentions. Plaintiff simply failed to show that similarly situated individuals were given building permits without meeting the statutory requirements.

Further, we agree with the district court that plaintiff's unreasonable seizure claim fails because the uncontradicted evidence shows that at the time of his arrest plaintiff was engaged in the very acts with which he was charged in the warrant. Finally, as the district court properly concluded, a negligent retention claim may not lie where the record is devoid of evidence that the

Town of Clarkton had any knowledge of previous misconduct by the employees whose negligent retention is alleged.

III.

Appellant further argues that the motion for JNOV on his claim of intentional infliction of emotional distress against defendant Hall was improperly granted. He contends that defendant Hall engaged in a continuous course of conduct over several years with intent to cause him emotional distress. While the allegations are various, they boil down to the following: appellant alleges that Hall arbitrarily denied Gooden a building permit, called him a "queer," stated that he intended to "get" Gooden, and used a colloquial vulgarism with reference to Gooden and the district

attorney. We hold, as did the district court, that none of the three elements of the claim has been established.

A claim of intentional infliction of emotional distress requires proof of three elements under North Carolina law; (1) extreme and outrageous conduct by the defendant, (2) which is intended to cause or recklessly does cause, (3) severe emotional distress to the plaintiff. Dickens v. Puryear, 276 S.E.2d 325, 335 (N.C. 1981). The tort is reserved for conduct which is "utterly intolerable in a civilized community." Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 123 (N.C. Ct. App. 1986) (quoting Restatement (Second) Torts, §46 comment (d) (1965)).

We agree with the district court that appellant has simply failed to

satisfy the elements required to make out a claim of intentional infliction of emotional distress. First, defendant's conduct was not "extreme and outrageous." Appellant argues that defendant Hall refused to issue him a building permit in order to carry out a personal vendetta against Gooden and cause him emotional harm. However, as noted in the district court's discussion of appellant's constitutional claims, Hall's actions were entirely appropriate under the North Carolina Building Code. Gooden was neither the owner of the building nor did he submit plans and specifications as required. It would be anomalous to hold that Hall acted "outrageously" when he correctly applied the law.

Hall's crude remarks about appellant surely constitute offensive conduct. However, courts have not held that every instance, even of indisputably offensive conduct, gives rise to a claim of intentional infliction of emotional distress. For example, "mere insults, indignities [and] threats" are not actionable under the rubric of this tort. Hogan, 340 S.E.2d at 123 (quoting Restatement (Second) Torts, §46 comment (d) (1965)). The "law [does not] intervene in every case where someone's feelings are hurt." Id. In Johnson v. Bollinger, 356 S.E.2d 378 (N.C. Ct. App. 1987), the court refused to impose liability where a defendant shook his hand in plaintiff's face, shouted profanities in a loud and offensive manner and said he would "get"

plaintiff. The court reasoned that, although the behavior was offensive, the facts did not evidence the "extreme [or] outrageous conduct" necessary to make out a cause of action for intentional infliction of emotional distress. Id. at 382.

The instant case stands in sharp contrast to West v. King's Dept. Store, Inc., 365 S.E.2d 621 (N.C. 1988), relied on by appellant. In West, the defendant store manager confronted plaintiffs in front of other customers and loudly and falsely accused them of stealing merchandise despite evidence of paid receipts. Similarly, Hall's alleged statements do not approach the situation in Woodruff v. Miller, 307 S.E.2d 176 (N.C. Ct. App. 1983), also relied on by appellant. In Woodruff a long-time high school principal

recovered because defendant posted a thirty-year-old criminal conviction n the local post office "Wanted" board alongside posters for unapprehended criminals. Each of the above cases involved the intentional subjection of plaintiffs to severe and excruciating public ridicule which differentiates them from cases which involve nothing more than the daily commerce in unkind comment.

In sum, the totality of Hall's behavior is simply not comparable to North Carolina cases imposing liability for intentional infliction of emotional distress. For example, Hall's actions did not involve sexual harassment, Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. Ct. App. 1986); Brown v. Burlington Industries, Inc., 378 S.E.2d 232 (N.C. Ct. App.

1989), physical abuse, Dickens v. Puryear, 276 S.E.2d 325 (N.C. 1981), or harassment in the work place, Dixon v. Stuart, 354 S.E.2d 757 (N.C. Ct. App. 1987); English v. General Electric Co., 683 F.Supp. 1006 (E.D.N.C. 1988). While Hall's conduct merits condemnation, his acts fall within the range of "rough language, and ... occasional acts that are ... inconsiderate and unkind," but against which we all are "expected and required to be hardened." Johnson, 356 S.E.2d at 382.

Plaintiff fares no better on the remaining two elements of his cause of action. For example, the infliction of emotional distress must be intended. But as the district court noted:

> Even if it were possible to consider the evidence regarding defamation in

> support of plaintiff's cause of action for emotional distress, plaintiff would still have the burden of proving that Hall intended by his defamatory statements to cause the plaintiff emotional distress. Here plaintiff's evidence fails him. Hall offered testimony, largely uncontradicted, that plaintiff's reputation in the Clarkton community was that he was a homosexual. This testimony by several witnesses to the effect that it was common knowledge that the plaintiff was a homosexual, supports Hall's contention that he certainly did not intend to cause Gooden extreme emotional distress. Rather, it supports the inference that Hall merely intended to state what he understood to be common knowledge in the community and that in no aspect of the matter could this be considered extreme and outrageous conduct.

Finally, we also agree with the district court that plaintiff's evidence is insufficient to sustain a jury verdict on the element of the extremity of distress actually

suffered. The record contains only plaintiff's bare assertions of loss of sleep and emotional strain, but no allegation that he sought medical attention or discussed the problem with friends and neighbors or was unable to function day to day. No corroborating evidence of mental distress was presented by plaintiff or any other witness. We cannot say that appellant has suffered emotional distress "of a very serious kind." Stanback v. Stanback, 254 S.E.2d 611, 622 (N.C. 1979) (quoting Prosser, The Law of Torts, §12 (4th ed. 1971)); West, 365 S.E.2d at 625.

IV.

Appellant finally argues that, at the close of the evidence, the trial court improperly forced him to choose

between causes of action for emotional distress and defamation. We agree that the forced election between plaintiff's claims of intentional infliction of emotional distress and defamation was inappropriate. However, much of what we have said in the previous section is pertinent to the present claim. Since the district court found evidence, largely uncontradicted, that Gooden had a reputation in the community for being a homosexual, the record does not support a cause of action for defamation. A directed verdict on this claim would thus have been warranted. See Tyson v. L'Eggs Products, Inc., 351 S.E.2d 834, 840 (N.C. Ct. App. 1987) (To recover for defamation "plaintiff must allege and prove that the defendant made false defamatory statements of or concerning the

plaintiff's reputation" (emphasis added).); Williams v. State Farm Mut. Auto Ins. Co., 312 S.E.2d 905, 907 (N.C. Ct. App. 1984) ("To be actionable, the statement must be false.").

V.

For the foregoing reasons the judgment of the district court is in all respects

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WILMINGTON DIVISION

ROBERT ALLEN GOODEN,	)	
	)	
Plaintiff	)	NO. 87-56-CIV-7
	)	
VS.	)	MEMORANDUM OF DECISION
	)	
THE TOWN OF CLARKTON, NORTH CAROLINA, et al.,	)	
	)	
Defendants	)	

Plaintiff commenced this diversity and civil rights action against defendants Town of Clarkton and various officials and employees of the town in their individual and official capacities alleging federal and state constitutional claims (denial of the right to due process, equal protection and unreasonable seizure), and state tort claims (malicious prosecution and abuse of process, defamation, assault

and battery, negligent retention of employee and intentional infliction of severe emotional stress). The action is before the court on the parties' cross-motions for summary judgment.

Plaintiff seeks partial summary judgment solely on two issues, namely that he was deprived of procedural due process when the town condemned the building in which he operated a restaurant business without giving him notice or opportunity to be heard, and that the town building code is unconstitutionally vague on its face and therefore void. In their cross-motion for summary judgment, defendants assert that there are no outstanding questions of material fact and that they are entitled to judgment as a matter of law on all of plaintiff's claims including the two just

mentioned. For the reasons outlined below plaintiff's motion will be denied and defendants' motion will be granted in part and denied in part.

The record contains the following undisputed facts.[1] Plaintiff, who described himself as a novelist, actor and screenwriter and a resident of California, alleged that due to his father's illness he began operating his parents' business, a restaurant known as Lee's Grill, in Clarkton, North

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[1]Plaintiff's motion for partial summary judgment is a twenty-three-page document comprised of a detailed recitation of plaintiff's version of the facts. This "motion" is accompanied by a twenty-four-page supporting memorandum of law. Plaintiff is reminded that under Local Rule 4.02 "[a]ll motions shall be concise." Recitation of the factual basis for a cause of action properly belongs in the supporting memorandum of law. Id. 5.01(b). This memorandum is limited in length to thirty pages unless prior court approval is given. Id. 5.05.

Carolina, in 1982. Plaintiff alleges that he leased the building containing Lee's Grill from his parents. On September 15, 1982 a fire damaged the building and the town building inspector, defendant W. A. Hall, condemned it. Hall did not post a notice that the building was condemned nor did he have a public hearing at that time. On the basis of his inspection Hall simply determined that the building was more than fifty percent burned, the condemnation standard set out by the state in Sections 102(d)(2) and 105.12, N.C. State Building Code, and ordered it condemned.[2]

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[2]Assuming that this action was unlawful for any reason, any cause of action based on it would have been barred by the three-year statute of limitations prior to the institution of this action on June 15, 1987.

Apparently the building thus condemned lay idle for the next two years and nine months and then in the spring of 1985 plaintiff again began using the building still owned by his mother, Gertrude Gooden, for storage and recreational purposes. On June 12, 1985 Hall sent Mrs. Gooden a letter informing her as follows: "The building which you own . . . has been deemed unsafe. As Building Inspector of Clarkton, I do hereby condemn this building under power of G. S. 160A 426. I request your presence at a Public Hearing on June 21, 1985 at 2:00 P.M., at the Clarkton Town Hall." Plaintiff did not receive notice of this hearing

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Plaintiff's rights, if any, must therefore be grounded on acts of the defendants committed on or after June 15, 1984.

but he attended it along with his mother.

The day before this hearing, June 20, Hall obtained a warrant for plaintiff's arrest alleging plaintiff had unlawfully and willfully proceeded to move and reconstruct a portion of a condemned wooden building without first obtaining a building permit required by N.C.G.S. § 160A-417. One June 25 the Town of Clarkton filed a civil action against plaintiff in Bladen County District Court seeking to enjoin plaintiff from doing any further work on the building and requiring plaintiff to demolish it. The criminal case against plaintiff was dismissed for insufficient evidence on June 26, 1985, and on that day Hall posted an official "condemned" notice on the building.

Hall's condemnation of the Lee's Grill building and other buildings in Clarkton generated sufficient controversy that on March 10, 1986 the Board of Commissioners of the town ordered that "any action taken by W. A. Hall, building inspector, or any other person of the Town of Clarkton relative to condemnation of any building or structure be rescinded (sic) until further study can be made by the Council."

On May 12, 1986 plaintiff applied for a building permit to perform further work on the building, but submitted no plans and specifications as required by the building code. Hall rejected plaintiff's application. Plaintiff applied again the following day. Hall again refused plaintiff's application but said he would issue

plaintiff a building permit when plaintiff submitted plans and specifications.

At about 11:45 a.m. on August 12, 1986 Tommy Baysden, the town trash collector, publicly assaulted plaintiff by striking him about the head, shoulders and stomach in the presence of Wade Tart, a town commissioner. Plaintiff and Baysden each secured warrants charging each other with assault. Baysden pled guilty to the criminal offense brought against him in Bladen County District Court. The assault charges brought against plaintiff were dismissed at Baysden's instance.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. The Constitutionality of the Clarkton Building Code Claim.

Plaintiff contends that the Building Code of the Town of Clarkton is unconstitutional because it "does not provide any standards, criteria, factors or other provisions which are to be applied by the building inspector to determine whether or not a permit to build shall be issued" and that it "vests the building inspector with unbridled authority to issue or deny permits in his discretion." Plaintiff challenges the town code provision concerning condemnation of unsafe buildings on the same basis.

The court need not determine whether these code provisions are unconstitutionally vague because the question does not arise under the facts

of this case. The town code provisions under question, enacted in 1954, were superseded by the North Carolina State Building Code which became effective April 1, 1978. The state code provides the following:

> The North Carolina State Building Code shall apply throughout the State, from the time of its adoption. However, any political subdivision of the State may adopt a building code or building rules and regulations governing construction within its jurisdiction. . . . No such building code or regulations shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above. . . . In the absence of approval by the Building Code Council . . . local codes and regulations shall have no force and effect.

N.C.G.S. § 143-138(e).

There is no evidence the town ever submitted its local code for approval by the state Building Code Council. Accordingly, the only building code relevant to the controversy at hand is that contained in the state building code.

In fact, Hall stated in the letter which he sent to plaintiff's mother giving her notice of the condemnation of her building and again at the time of the hearing, that he was condemning the building under power of N.C.G.S. § 160A-426, the state statute relating to condemnation of unsafe buildings. It thus appears that the Clarkton Building Code, having been superseded by the state code which Hall applied in this case, is not relevant to decision here, and plaintiff's motion for summary

judgment on the issue of its constitutionality will be denied.

2. The Procedural Due Process Claim.

Plaintiff also moves for summary judgment on his claim that he was deprived of procedural due process when the town condemned Lee's Grill without giving him proper notice or a hearing. To prevail on his motion plaintiff must show that he had a constitutionally protected property interest in the building which was condemned, and that he was denied sufficient notice and opportunity to be heard on the condemnation issue. Board of Regents v. Roth, 408 U.S. 564 (1972). The Constitution does not itself create the property interests which are entitled to procedural due process protection.

Rather, the underlying property interest must be created by some independent source such as state law. Id.

Plaintiff based his claim of a property interest on his "status as the business operator and licensee of Lee's Grill at the time of the wrongful condemnation, as well as [his] status as lessee and tenant." This argument must fail because plaintiff has not shown that he has a property interest in the condemned premises sufficient to entitle him to procedural due process. The relevant state law in fact forecloses his argument: the condemnation provision contained in the state statute provides that if the owner of a condemned building fails to take prompt corrective action after the local inspector posts a notice of the

dangerous character of the building on the building itself, then the inspector shall give the owner notice of the apparent unsafe condition and the time and place of a hearing to be held before the inspector. N.C.G.S. § 168-426, 428. Assuming that plaintiff had a leasehold interest in the property, he had no right to procedural due process with respect to the condemnation of the building in question.

Moreover, the court notes that any claim plaintiff might have had on procedural due process grounds is precluded by the fact that plaintiff actually knew about and personally attended the hearing with his mother, the owner of the property, who was represented by counsel at the hearing. By attending this meeting plaintiff

waived any claim he might have had to personal notice of the meeting. Although he was free to do so, the record also shows that plaintiff failed to raise substantive objections at this hearing to the condemnation action.[3] Plaintiff's procedural due process claim arising out of his failure to receive formal notice of a hearing which he actually attended and had an opportunity to participate in is simply without merit, and defendants' motion

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[3]According to her deposition testimony the only question raised by the owner and her attorney at the meeting was the short period of time which she had been given to demolish the condemned building. She apparently needed more time in which to negotiate a settlement of her suit against the fire insurance company which had the coverage on the building at the time of the fire in 1982. This claim was thereafter settled for about $70,000, some $5,000 less than the face amount of the policy. Plaintiff Robert Gooden received no part of this settlement.

for summary judgment on this ground will be granted and plaintiff's motion denied.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. Refusal To Issue Building Permit - Plaintiff's First and Second Claims for Relief.

In his first claim for relief plaintiff alleges that defendants Town of Clarkton and W. A. Hall unlawfully refused to grant him a building permit in violation of his right to substantive due process and in his second claim for relief he alleges that the refusal to issue him a building permit denied him equal protection of the laws, all in violation of his rights under the Fourteenth Amendment. Defendants have moved for summary judgment on each of these two claims, asserting as grounds for the motion

that plaintiff did not possess the constitutionally protected property interest in the building permit necessary to entitle him to procedural and substantive due process and that plaintiff has not shown any intentional or purposeful discrimination necessary to support his equal protection claim.[4]

The first step in resolving the issues thus raised is to determine whether plaintiff had a protectable property interest in the building

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[4]In his brief plaintiff has raised for the first time the contention that defendants' actions have deprived him of a liberty interest by precluding him from engaging in a lawful business. However, even if this contention had been properly pleaded in the complaint, the record evidence shows only that plaintiff has not been able to operate his business in the condemned building which formerly housed Lee's Grill. There is no evidence that plaintiff has not been free to operate a restaurant business elsewhere.

permit he sought sufficient to give rise to rights under the due process and equal protection provisions of the Fourteenth Amendment. Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983). In the present case such property interest must be grounded on state or local law. A careful consideration of the record evidence in the light of the relevant state and local law has led to the conclusion that plaintiff had no such property interest in the permit and that its denial, even if attended with bad faith and malice on the part of Hall as plaintiff alleges, did not constitute a violation of plaintiff's constitutional rights.

The North Carolina State Building Code as authorized and adopted pursuant

to N.C.G.S. § 143-138, provides in pertinent part as follows:

> Section 105.3 - Permits Required
>
> (b) Existing Buildings: No person shall commence or proceed with reconstruction, alteration, repair, moving or demolition of any existing building or structure without first applying for and receiving one or more permits covering all such work.
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> Section 105.4 - Application for Permit
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> (a) Each application for a permit shall be filed with the appropriate local Inspection Department, in writing, on a form furnished for that purpose, and shall contain a general description of the proposed work and its location. The application shall be signed by the owner or his authorized agent. (Emphasis supplied.)
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> * * * * * * * * * * * * * *
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> (c) When required by the Inspection Department, two or more copies of specifications and of drawings drawn to scale with sufficient clarity and detail

to indicate the nature and character of the work shall accompany each application. Such drawings and specifications shall contain information, in the form of notes or otherwise, as to the quality of materials, where quality is essential to conformity with this Code. The Inspection Department may require details, computations, stress diagrams, and other data necessary to describe the construction and basis of calculations, and they shall bear the signature of the person responsible for the design.

(d) No permit shall be issued unless the plans and specifications are identified by the name and address of the author thereof.

Section 105.5 - Permits

(a) If the Inspection Department is satisfied that the work described in the application for permit and the drawings and specifications filed therewith conforms to the requirements of this Code and all other applicable State and local laws, it shall issue a permit therefor to the applicant.

Similar provisions are found in Sections 160A-417 to 160A-438 of the General Statutes of North Carolina, and a criminal penalty is prescribed for non-compliance with stop orders issued pursuant to the statute.

In construing a provision similar to Section 105.4(a) contained in the Asheville, North Carolina Building Code the North Carolina Supreme Court held that the term "owner" as used in the building code "connotes not only the absolute owner of the property but also the equitable owner, or prospective vendee." MacPherson v. City of Asheville, 283 N.C. 299, 307, 196 S.E.2d 200, 61 A.L.R.3d 1119 (1973). (Vendee under a binding executory contract to purchase property held its "owner" for purposes of establishing the right to a building permit.) In

the same case the court quoted with approval the general rule from 62 C.J.S. Municipal Corporations § 227 (3)(c) (1949) as follows:

> Only a person having a right to erect the structure for which a building permit is sought is entitled thereto, but the application need not be made by the absolute owner of the property. . . . In a proper case it may be made by a person having only a contract to purchase the property if he has the consent and approval of the owner. . . .

In his deposition testimony plaintiff states that he had no formal lease of the premises from his parents but that he simply took over the rundown business - "a hamburger joint" - from a former tenant in March 1982 with the view to managing the business and building it back up so that his parents could get a "proper tenant" and he could return to California. (Volume

2, Plaintiff's Deposition, pp. 49-59.) He paid the bills but no rent or taxes, and his purpose was to build up the business and its good will in order that his parents "could receive income from it for however many years in the future they intended to do it." (Id. p. 55.) Title to the real estate remained in the plaintiff's parents and there is simply no evidence that plaintiff personally has ever had any kind of property interest in it.[5] There is nothing in the deposition

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[5]Since the controversy with defendants arose plaintiff's father has died whereupon his mother, Gertrude Gooden, became the sole owner of the property. Sometime thereafter - the depositions of plaintiff and his mother, which runs some 750 pages in length, do not say when - Gertrude Gooden executed a deed of gift to the property to Tracy Corporation, a North Carolina corporation of which plaintiff is the sole owner. Tracy Corporation is not a party to this suit.

testimony of the plaintiff concerning the agreement he had with his parents that gave him any right to do anything except to operate the restaurant business for their benefit. Nor is there any evidence that when he made application for a building permit that he was doing so as the authorized agent of the property owners. On these facts he was not entitled to the building permit he sought and cannot complain that it was wrongfully denied him.

Even so, having been told by building inspector Hall that the permit would issue upon plaintiff's presentation of plans and specifications as required by Section 105.4 of the North Carolina State Building Code, plaintiff chose not to do so, apparently relying on the fact that others whom he considered to be

similarly situated, had not been required to do so. We are not told whether those applicants were otherwise qualified as property owners or authorized agents of property owners to apply for building permits, but be this as it may, Hall acted under authority of Section 105.4(c) and 105.5(a) of the North Carolina Building Code in requiring plaintiff to submit plans and specifications as a condition precedent to the issuance of a building permit, and plaintiff's failure to comply constitutes an additional reason why he was not entitled to a building permit.

The cases relied upon by plaintiff, Scott v. Greenville County, supra, and Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986), are inapposite. In those cases the applicants for permits were persons

entitled under state law to apply for the permit who had complied with all conditions precedent such as the furnishing of plans, etc.

Having failed to show that he was entitled to the issuance of a building permit in the first place or that others who were in fact similarly situated had been granted permits, it follows that the denial of a permit to the plaintiff did not deprive him of his due process or equal protection rights. Under somewhat similar facts the North Carolina Supreme Court held in Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946), that a person who has no present right to erect a building on the property of another cannot successfully apply for a building permit and "[t]o withhold from him a permit to do what he has no

present right to do cannot, in law, impose an 'undue and unnecessary hardship' upon him." Id. p. 110.

Defendants' motion for summary judgment on plaintiff's first and second claims for relief will be granted.

2. Unlawful Seizure, Malicious Prosecution, and Abuse of Process - Plaintiff's Third and Fourth Claims For Relief.

In his third claim for relief plaintiff alleges that on June 20, 1985 defendants caused a warrant for the plaintiff's arrest to be issued charging him with failing to obtain a building permit, "which said arrest warrant was executed by Ralph Smith [Clarkton's Chief of Police] by unreasonably seizing the plaintiff's person, taking him into custody and

transporting him to the Bladen County jail." It is further alleged that this arrest was without probable cause, "and for the purpose of W. A. Hall satisfying his own animosity, revenge, and ill will toward plaintiff . . . in an attempt to penalize plaintiff for the exercise of his constitutional rights to pursue a legitimate business enterprise."

In plaintiff's fourth claim for relief it is alleged that when the criminal charges mentioned above were called for trial defendant Hall "admitted charging the plaintiff with the wrong violation" whereupon the charges "were voluntarily dismissed by the State of North Carolina, thus terminating said charge in plaintiff's favor." Plaintiff therefore alleges that "the defendants maliciously

prosecuted the plaintiff and abused the criminal process in violation of the laws of the State of North Carolina and 42 U.S.C. 1983."

The warrant in question in which plaintiff was arrested was issued pursuant to the complaint of the defendant, W. A. Hall, on June 20, 1985 on the basis of which the magistrate found

> that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant unlawfully, willfully did proceed to move and reconstruct a portion of a condemned wooden building without first obtaining a building permit required by 160A-417 in violation of the law referenced on this Warrant.

The statute referenced in the warrant, N.C.G.S. § 160A-417, provides in pertinent part as follows:

§ 160A-417. Permits.

No person shall commence or proceed with

(1) The construction, reconstruction, alteration, repair, movement to another site, removal, or demolition of any building or structure,

* * * * * * * * * * * * * * *

without first securing from the inspection department with jurisdiction over the site of work any and all permits required by the State Building Code and any other State or local laws applicable to the work.

On June 26, 1985 the prosecuting attorney, Thomas S. Hicks, entered a dismissal of the charge against the plaintiff citing as the reason therefore "insufficient evidence." In his deposition testimony (Hicks Deposition at 25) Hicks states that prior to calling the case for trial he inquired of defendant Hall if he had any evidence that the building was

moved or reconstructed and that Hall answered in the negative whereupon Hicks said, "Well, as far as I'm concerned that disposes of this charge, because that's an element we've got to prove."

Actually the uncontradicted evidence shows that W. A. Hall as building inspector by letter dated June 12, 1985 addressed to Gertrude Gooden, owner of the building in question, had condemned it and requested her presence at a public hearing on June 21, 1985 at the Clarkton Town Hall; that prior to the issuance of the warrant on June 20, 1985 Hall accompanied by Ralph Smith, Chief of Police, went to the building site for the purpose of serving on the plaintiff a stop order; that the found the plaintiff doing some work on a door for a screen porch which he had erected

on a nearby property from materials salvaged from the condemned building; and that he put the paper containing the stop order in his pocket and kept on working. It is not disputed that the plaintiff never at any time obtained a building permit in connection with any of these activities.

With respect to how he was treated by Officer Smith during the course of his arrest, plaintiff makes no claim that Smith was anything other than nice to him. In his personal notes of the events surrounding the arrest plaintiff says:

> Smith allowed me to pick up my tools, lock up the house trailer where I was working, and then Smith followed me to my parents' house (about one mile), where I left my father's pickup truck and I went inside and took a shower and changed clothes. Smith

> waited in the car. I rode to Elizabethtown jail with Smith in the police car. During the ride, Smith mentioned that Hall controls Clarkton and I'd better learn to get along with him. Again, he was very apologetic for the arrest, and asked what caused the bad blood between Hall and me.

Defendants' Exhibit 18 to Plaintiff's Deposition.

The warrant served by Officer Smith on the plaintiff was regular on its face, and it showed a finding by the magistrate of probable cause. At the time of the service of the warrant plaintiff was engaged in doing the very acts for which he was charged in the warrant. In no aspect of the matter can it be said that plaintiff's arrest by Officer Smith constituted an illegal seizure insofar as Smith was concerned.

It is not contended that defendant Hall participated in any way in the

plaintiff's arrest, and thus the inquiry in his case is whether he had probable cause to obtain the warrant against plaintiff. In the court's view based on the undisputed facts this inquiry must be answered in the affirmative. Defendant Hall may well have stated to the prosecuting attorney that he had no evidence that the condemned building had been moved or reconstructed, but the plaintiff himself freely admits that he had demolished a portion of the building and moved it to another site; that he was in fact working on a new structure erected from the salvaged materials at the time Hall and Officer Smith arrived to serve the stop order on him; and that he continued working on this structure after they left. He further admits that he had no building permit

for the demolition of the condemned structure nor the erection of the new one nearby. These were acts proscribed by the statute under which the warrant was issued and they provide ample support for the finding by the magistrate of probable cause.[6]

The standard for determining probable cause is one of reasonableness, Fowle v. Fowle, 263 N.C. 724, 140 S.E.2d 398 (1965), and on the basis of the foregoing uncontradicted facts, the defendants reasonably believed that the plaintiff was in violation of the statute and had probable cause to have the warrant issued against him. Even though in

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[6]For purposes of this decision the court has assumed that the warrant as drawn charged a crime under North Carolina law. Neither of the parties has addressed this question in the briefs submitted.

Hall's case the plaintiff has made a strong showing of malice, the finding of probable cause precludes an action against defendants Hall and Smith based on wrongful arrest or malicious prosecution. Hansen v. Meese, 675 F.Supp. 1482, 1486-87 (E.D.Va. 1987).

Plaintiff's claim based on abuse of process is likewise without merit. The gist of such an action is the improper use of the process after it has been issued. The two elements of the cause of action are first, an ulterior purpose and second, an act in the use of the process not proper in the regular prosecution of the proceeding. Manufacturers & Jobbers Finance Corporation v. Lane, 221 N.C. 189, 192, 19 S.E.2d 849, 853 (1942). In this case there is no evidence that the warrant issued for plaintiff's

arrest for violation of N.C.G.S. § 160A-417 was used for any purpose other than that for which it was issued: to have the plaintiff arrested and brought before the court for the alleged violation of the statute.

Defendants' motion for summary judgment on plaintiff's third and fourth claims for relief will be granted.

3. Defamation - Plaintiff's Fifth Claim for Relief.

In his fifth claim for relief the plaintiff alleges that defendants W. A. Hall and Tommy Baysden have stated publicly that the plaintiff engaged in an act of crime against nature with the district attorney who voluntarily dismissed the criminal charges against the plaintiff, a violation of N.C.G.S.

§ 14-177, and that plaintiff was promoting and preparing the production of obscene and pornographic pictures and movies, a violation of N.C.G.S. §14-190.1, et seq., crimes involving moral turpitude. Defendants Hall and Baysden are sued in their individual capacities, and there is ample evidence in the record tending to support plaintiff's allegations in these respects. The defendants' motion for summary judgment as to defendants Hall and Baysden in their individual capacities will therefore be denied.

4. Assault and Battery - Plaintiff's Sixth Claim for Relief.

In his sixth claim for relief plaintiff alleges that on August 12, 1986 the defendant Tommy Baysden approached the plaintiff on a public

street in the Town of Clarkton and without any warning "called the plaintiff a homosexual and physically assaulted and battered the plaintiff by repeatedly striking the plaintiff about the head and body with his fists" resulting in permanent injuries to plaintiff's head, neck, shoulders and body. It is further alleged that at the time of this assault Baysden was acting in the course and scope of his employment for and on behalf of the Town of Clarkton.

As stated, Baysden is sued in his individual capacity, and since he pleaded guilty to a charge of assault and battery based on the foregoing facts, it follows that he is not entitled to summary judgment on this count. There is not evidence, however, that Baysden was acting in the scope of

his employment by the Town of Clarkton at the time of the assault and for this and other reasons to be stated later, the Town of Clarkton's motion for summary judgment on this count will be granted.

5. Malicious Prosecution of Plaintiff by Baysden - Plaintiff's Seventh Claim for Relief.

In his seventh claim for relief plaintiff alleges that following his charging Tommy Baysden with the assault described above Baysden obtained a warrant charging the plaintiff with assault; that plaintiff's arrest on this charge was without any probable cause; and that Baysden later voluntarily had the charges dismissed by the State of North Carolina. Although the complaint alleges "that

the charges brought by Tommy Baysden and the Town of Clarkton constitute malicious prosecution," there is no evidence that the Town of Clarkton had anything at all to do with the issuance of the warrant charging him with assault.

Since Baysden is sued in his individual capacity and has produced no evidence to warrant a finding that there was any probable cause to justify his obtaining a warrant charging the plaintiff with assault, Baysden's motion for summary judgment as to plaintiff's seventh claim for relief will be denied and the motion of Town of Clarkton for summary judgment as to this count will be granted.

6. Negligent Hiring and Retention of Employees - Plaintiff's Eighth Claim for Relief.

In his eighth claim for relief plaintiff alleges that the Town of Clarkton negligently hired, trained and supervised defendants Hall and Baysden, negligently failed to promulgate rules and regulations governing their conduct and negligently retained Hall and Baysden in their employment "notwithstanding they knew or should have known that the conduct of W. A. Hall and Tommy Baysden had caused the plaintiff severe emotional distress and mental suffering in addition to physical pain and suffering and personal injuries."

In order to establish a cause of action for negligent hiring or retention of an employee it must be

shown that defendant employer owed a duty to the plaintiff which was breached and that the damages which followed were proximately caused by the defendant employers' breach of duty.

> [I]t has been suggested that there are three requirements concerning the plaintiff and the employment relationship which must be satisfied before the law will impose a duty upon the employer to use due care in hiring and retaining employees on its behalf. These requirements are (1) the incompetent employee and plaintiff are in places where each have a right to be at the time that the plaintiff sustained injury; (2) the incompetent employee and the plaintiff came into contact as a direct result of the employment; and (3) the employer has received or would have received some benefit, either direct, indirect or potential, from the meeting of the employee and the plaintiff. A review of the cases in which recovery has been sought under the negligent hiring or negligent retention doctrines reveals that recovery has been denied where any one of

> the above requirements has not been satisfied.

29 Am.Jur. Trials 272, 283 (1981). Application of these principles to the case at hand results in the conclusion that plaintiff's cause of action based on negligent hiring and retention of employees Hall and Baysden must fail.

At the time of the acts committed by Hall of which plaintiff complains Hall had been employed by the Town of Clarkton for forty-six years, and the record is devoid of any evidence tending to show that during this time he had ever engaged in similar wrongful conduct which was brought to the the attention to the Town of Clarkton. In the discharge of his duties as a garbage collector Baysden does not come in contact with the public and the town receives no benefits from any

incidental meeting which Baysden has with the public. His encounter with the plaintiff was in no way related to the discharge of his duties in collecting garbage. There is likewise no evidence that the town had any knowledge of any vicious propensities on the part of Hall or Baysden prior to the acts complained of.

The conclusion is that there is no genuine issue of material fact on the question of the negligent hiring and retention of Hall and Baysden in the employment of the Town of Clarkton, and its motion for summary judgment as to the eighth claim for relief will be granted.

7. Intentional Infliction of Emotional Distress - Plaintiff's Ninth Claim for Relief.

After incorporating by reference all the prior allegations of his complaint the plaintiff alleges in his ninth claim for relief that:

> [t]he conduct of defendants, by their actions and omissions hereinbefore set forth, constitutes extreme and outrageous conduct beyond that tolerated by a decent society. Defendants have inflicted plaintiff with severe emotional distress.

The Town of Clarkton and all the defendants sued only in their official capacities have moved for summary judgment on this claim as well as the claims based on defamation, assault and battery, malicious prosecution and abuse of process on the ground that the action is barred by the doctrine of sovereign immunity. In North Carolina

this common law rule of governmental immunity for civil liability in tort still obtains unless immunity has been waived through the purchase of liability insurance. In this case the evidence shows that the Town of Clarkton purchased public officer liability insurance through National Union Fire Insurance Company of Pittsburgh but that the police specifically excludes any coverage for injury arising from assault and battery, malicious prosecution, abuse of process, intentional infliction of severe emotional distress and defamation.

It thus appears that the Town of Clarkton and its former commissioners, Linda Revels, Steve Prince and Lawrence McDougald; its present commissioners, Wade Tart, Roy Butler and Cathy McEwen;

W. A. Hall, building inspector, Ralph Smith, chief of police, Dan Meshaw, mayor of the Town of Clarkton, Tommy Baysden and their successors in office, insofar as they are sued in their official capacities, are all immune from liability under the sovereign immunity doctrine, and their motion for summary judgment as to plaintiff's claims based on intentional infliction of severe emotional distress, defamation, assault and battery, malicious prosecution and abuse of process must be granted.

The motion for summary judgment as to plaintiff's ninth claim for relief as filed on behalf of defendants Hall and Baysden in their individual capacities will be denied.

8. Plaintiff's Claims Against Defendant Dan Meshaw In His Individual Capacity.

In paragraph 10 of the plaintiff's amended complaint it was alleged that defendant, Dan Meshaw, was the duly elected mayor of the Town of Clarkton during the times in question and that he "formulated, developed, executed, and administered official municipal policy, and his acts and/or edicts may fairly be said to represent the official municipal policy of the Town of Clarkton." These allegations concluded with the statement that Meshaw was being sued only in his official capacity, and this is the only allegation in the amended complaint which refers to Meshaw by name. It is alleged in paragraph 19 under plaintiff's first claim for relief that the town and its mayor were liable to

the plaintiff under his allegations of "denial of due process and property," but this claim for relief is being dismissed.

By order filed March 8, 1988 plaintiff was allowed to amend his complaint to state a cause of action against Meshaw in his individual capacity. Plaintiff undertook to do this by filing on April 25, 1988 a second amended complaint which read as its entirety as follows:

> Pursuant to the Order of the Honorable Charles K. McCotter, Jr., United States Magistrate, plaintiff hereby amends his Complaint suing defendant Dan Meshaw in his individual capacity.

To this second amended complaint the defendants filed in apt time the same fifteen-page answer which had been filed to the plaintiff's original amended complaint, and this answer

contained a motion to dismiss the second amended complaint under Rule 12(b)(6), F.R.Civ.P., for failure of the complaint to state a claim against Meshaw upon which relief could be granted. While there is evidence in plaintiff's deposition that Meshaw participated in the defamation of the plaintiff, a cause of action against him on these grounds cannot be sustained in the absence of proper allegations in the complaint. There being no such allegations in plaintiff's pleadings as presently filed, the motion to dismiss the action as to defendant Meshaw in his individual capacity will be granted.

CONCLUSION

To summarize, the motions for summary judgment as to all defendants

in their individual and official capacities will be granted as to plaintiff's first, second, third and fourth claims for relief. The motions will be granted as to all defendants in their official capacities as to plaintiff's fifth, sixth, seventh, eighth and ninth claims for relief., The motions of the defendant W. A. Hall and Tommy Baysden in their individual capacities as to plaintiff's fifth and ninth claims for relief will be denied. The motion for the defendant Tommy Baysden in his individual capacity as to plaintiff's sixth and seventh claims for relief will be denied; and the motion of the defendant, Dan Meshaw, to dismiss plaintiff's second amended complaint as to him in his individual capacity will be granted.

The court having determined that there is no just reason for delay expressly directs pursuant to Rule 54(b), F.R.Civ.P., the entry of final judgment with respect to all of plaintiff's claims as to which summary judgment has been granted herein and as to defendant Meshaw's motion to dismiss.

F.T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE
August 29, 1988.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 88-3630

ROBERT ALLEN GOODEN,

Plaintiff-Appellant

versus

TOWN OF CLARKTON, NC, A municipal corporation; LINDA REVELS; STEVE PRINCE, LAWRENCE MCDOUGALD, Former Commissioners, Town of Clarkton; WADE TART; ROY BUTLER, CATHY MCEWEN, Present Commissioners, Town of Clarkton; W.A. HALL, Building Inspector, Town of Clarkton; RALPH SMITH, Chief of Police, Town of Clarkton; DAN MESHAW, individually and as Mayor, Town of Clarkton; TOMMY BAYSDEN, and their successors in office,

Defendants-Appellees.

NO. 89-2019

ROBERT ALLEN GOODEN,

Plaintiff-Appellant

v.

W. A. HALL, Building Inspector, Town of Clarkton, North Carolina,

Defendant-Appellee,

and

TOWN OF CLARKTON, NC, A municipal corporation; LINDA REVELS; STEVE PRINCE; LAWRENCE MCDOUGALD, Former Commissioners, Town of Clarkton; WADE TART; ROY BUTLER, CATHY MCEWEN, Present Commissioners, Town of Clarkton; DAN MESHAW, individually and as Mayor, Town of Clarkton; TOMMY BAYSDEN, and their successors in office; RALPH SMITH, Chief of Police, Town of Clarkton

Defendants.

On Petition for Rehearing
With Suggestion
for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Phillips and Judge Fox (U.S. District Judge for the Eastern District of North Carolina).

For the Court,

_____

CLERK

(2)

No. 90-183

IN THE

Supreme Court of the United States

October Term, 1990

ROBERT A. GOODEN,

Petitioner,

v.

THE TOWN OF CLARKTON, NORTH CAROLINA, *ET AL.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Petitioner can be deprived of a property interest for Respondents' condemnation of a building that Petitioner did not own nor in which he possessed a constitutionally protected property interest?

II. Whether Petitioner can be deprived of a property interest for Respondents' denial of a building permit to repair a building that Petitioner did not own nor in which he possessed a constitutionally protected property interest when Petitioner failed to comply with the requirements necessary for a permit to issue?

III. Whether Respondents deprived Petitioner of any constitutional rights, privileges or immunities and if so whether those deprivations were executed in accordance with the Town's policy or custom?

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No. 90-183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT A. GOODEN,

Petitioner,

v.

THE TOWN OF CLARKTON, NORTH CAROLINA, ET.AL.,

Respondents.

****

ON PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

STATEMENT OF THE CASE

Petitioner brought this action against Respondents Town of Clarkton and various officials and employees of the Town of Clarkton, both in their individual and official capacities on June 15, 1987. Petitioner set forth his allegations in eleven counts. Petitioner alleged federal and constitutional claims (denial of right to due process, equal protection and unreasonable seizure), and state tort claims (malicious prosecution, abuse of process, defamation, assault and battery, negligent hiring and retention of employees, and intentional infliction of severe emotional distress). The facts are aptly set forth in the opinions of the Fourth Circuit

Court of Appeals and the District Court. (Petition, p. 1A). Nevertheless, pursuant to Rule 15 of the Supreme Court Rules, Respondents are compelled to point out misstatements, mischaracterizations and improper facts advanced by Petitioner.

Petitioner, Robert Allen Gooden (hereinafter "Petitioner") who described himself as a novelist, actor and screenwriter and a resident of California, alleged that he began operating his parent's business, a restaurant known as Lee's Grill, in Clarkton, North Carolina, in 1982. (Complaint at 2; JA 10). Petitioner alleged that he leased the Building containing Lee's Grill (hereinafter "the Building") from his parents. (Complaint at 6; JA 14). However, Petitioner has no written lease and paid no consideration or rent for use of the Building. (Petitioner Dep. Vol. II at 53).

On September 15, 1982, a fire damaged the Building. On that day, the Town building inspector, Defendant W.A. Hall (hereinafter "Hall") inspected the Building. (Hall Dep. Vol. I at 34). Hall inspected the Building three or four times. (Hall Dep. Vol. I at 39, JA 136). On the basis of his inspection, Hall determined that the Building was more than 50% damaged, pursuant to the standards set out by North Carolina in §§ 101(6)(d)(2) and 105.12 of the North Carolina State Building Code (hereinafter "the Code"), and ordered it condemned.[1] (Hall Dep. Vol. II at 38-39). This lawsuit originated from the condemnation and subsequent denial of a building permit to Petitioner to work on the Building.

During the next two years following the fire, the Building remained unused and vacant. On January 18, 1985 while the owner of the Building, Gertrude Gooden, was negotiating an insurance settlement for the damage to the Building, Hall sent Gertrude Gooden a letter stating that the Building could not be restored. (G. Gooden Dep. at 64-67). Likewise, on January 23, 1985, Wade Bray, the Bladen County Building Inspector, sent a letter to Mrs. Gooden independently confirming Hall's conclusion that the Building could not be restored. (Hall Dep. Vol. I at 38).

---

[1] The N.C. State Building Code (N.C.S.B.C.) is promulgated under the authority of North Carolina General Statues. N.C.G.S. § 143-138 (1987). The Code sections correspond to specific statute sections. To avoid repetition, Defendants, will cite only to the Code sections.

Wade Bray inspected the Building at Perry Meshaw's request. (P. Meshaw Dep. at 18). Perry Meshaw was requested by Lee Gooden, Petitioner's father, to be an arbitrator in Gertrude Gooden's claim against the insurance company for damage to the Building. (P. Meshaw Dep. at 10).

In the following months, the insurance settlement for the Building was finalized. Along with Perry Meshaw, Layton Priest a local building contractor, acted as umpire in an arbitration to determine the damage to the Building. (Petitioner Dep. Vol. II at 94). Their conclusion was that the Building was over 50% damaged. (Priest Dep. at 9-11; P. Meshaw Dep. at 15). The Code requires buildings damaged in excess of 50% to comply with the requirements for new buildings. N.C.S.B.C. § 101.6(d)(2)(1984) (Pritchard Dep. at 20). Once over 50% damaged, the Building was condemned. Once condemned, it was a total loss. Therefore, Petitioner's mother, the owner, received over $70,000 of a $75,000 insurance policy on the Building. (G. Gooden Dep. at 71-81).

Notwithstanding the condemnation, the letters to Petitioner's mother and the insurance settlement, Petitioner began using the Building in the spring of 1985. (Complaint at 6; JA 14). Electricity was restored to the Building by an "elaborate drop cord" and Petitioner began showing videotapes to young adults and minors. (Petitioner Dep. Vol. I at 152-154). On June 12, 1985, Hall again sent Mrs. Gooden a letter informing her as follows: "The building which you own . . . has been deemed unsafe. As building inspector of Clarkton, I do hereby condemn this building by power of G.S. 160A-426. I request your presence at a public hearing on June 21, 1985 at 2:00 p.m., at the Clarkton Town Hall." (G. Gooden Dep. at 64-67; JA 96).

On June 20, 1985, the day before the hearing, Hall learned that the Petitioner was again working on the Building without a building permit. (Hall Dep. Vol. II at 147). Petitioner had dismantled a portion of the Building and used the dismantled portion to construct a porch across the street from the Building. (Petitioner Dep. Vol. III at 18). Therefore, pursuant to the Code, Hall ordered the Petitioner to cease dismantling the Building without a permit. N.C.S.B.C. § 105.8 (1984), (Hall Dep. at 23-24; JA 382). Petitioner put the stop order in his pocket and continued working in flagrant disregard of the stop order. (Petitioner Dep.

Vol. III at 17). Hall told Petitioner he would seek an arrest warrant if Petitioner continued working. (Smith Dep. at 54). Petitioner continued working, so Hall obtained a warrant for Petitioner's arrest to stop Petitioner from unlawfully and wilfully removing and reconstructing a portion of a condemned wooden building without first obtaining a building permit as required by N.C.G.S. § 160A-417. (Hall Dep. Vol. II at 97; JA 97). Petitioner admitted that he altered and moved the Building without a permit. (Petitioner Dep. Vol. III at 18).

The condemnation hearing was held on June 21, 1985. At the hearing, Petitioner, Petitioner's mother and her attorney attended and requested that Petitioner's mother be given additional time to demolish the Building so that the insurance settlement could be resolved. (G. Gooden Dep. at 80). It is undisputed that the owner of the Building never challenged the condemnation or requested a building permit. (G. Gooden Dep. at 44 and 62).

On March 10, 1986, after much controversy and a change in the composition of the Clarkton Board of Commissioners, the Board ordered that all building condemnations be rescinded including the condemnation of the Building.

Petitioner mischaracterizes Mr. Hall's letters to the Attorney General's office and to the N.C. Building Code Council. (Petition, p. 27). Hall explained that he wrote the letters seeking guidance because he was frustrated by Petitioner's repeated violations of the Code. (Hall Dep. Vol. I at 53-54; Hall Dep. Vol. II at 64).

On May 12, 1986, Petitioner asked for a building permit to perform further work on the Building, but submitted no plans and specifications as required by the Code. N.C.S.B.C. § 105.4(c)(1984). Consequently, Hall rejected Petitioner's application. Petitioner applied again the following day. Hall again refused Petitioner's request but said he would issue Petitioner a building permit when Petitioner complied with the Code by submitting the required plans or specifications. (Hall Dep. Vol. I at 79). Petitioner has never submitted any plans or specifications.

Petitioner relies on a statement executed by former police chief Ralph Smith and found on pages 105 and 106 of the joint appendix. (Petition, pp. 12, 15). The statement reveals that it was prepared and drafted by Petitioner based on his own recollection and personal knowledge. Nowhere does this statement indicate

that Smith is competent to make the statement or that the events recorded were based on his personal knowledge. Thus, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, the statement was inadmissible and should not have been considered. Fed. R. Civ. Pro. 56(e) (1982). In fact, Petitioner prepared every affidavit and statement included in the joint appendix, all of which fail to affirmatively allege competency and all of which contain inadmissible statements. In addition, Petitioner's assertions are not supported by the record. All of Petitioner's evidence, that he asserted as shocking to the conscience of the Court, was improper. For example, Petitioner relies upon an alleged recording of a telephone conversation between Clarkton Mayor Dan Meshaw and an attorney named William Richardson. Mayor Meshaw has expressly stated that the surreptitious recording was made without his knowledge or consent and that it was incomplete and inaccurate. (Meshaw Dep. Vol. II at 5-6). Further, Meshaw explained that his conversations with Richardson did not apply to Petitioner or the Building. (Meshaw Dep. Vol. II at 7-8). Yet, Petitioner urges this Court to rely upon this recording.

Petitioner does not contend that he was a member of a suspect class, nor does he allege to have been denied a fundamental right. He simply alleged that others similarly situated were granted building permits. (Complaint at 9; JA 17). Respondents do not deny that Petitioner twice requested a building permit. It is undisputed that issuance of the requested building permit required submission of plans and specifications to the Town building inspector, to which the Petitioner admits his failure. There are no facts that suggest others were similarly situated with Petitioner. Petitioner did not own the Building. (Petitioner Dep. Vol. I at 151). The Building was woodframe and in the primary fire district. (Hall Dep. Vol. I at 30). The Building was being occupied by Petitioner and others, including minors, despite its condition. (Petitioner Dep. Vol. I at 154). There is no evidence that anyone other than Petitioner needed to be arrested to enforce the Code. (Hall Dep. Vol. II at 96-97). On July 16, 1985, during the course of this controversy, Hall issued Petitioner a building permit to build a screen porch. (Hall Dep. Vol. II at 70; JA 381). Never before had the situation arisen where a woodframe building located in the primary fire district was damaged by more than 50%

and someone other than the owner sought to work on the Building. (Hall Dep. II at 96-97).

Petitioner makes many references to alleged statements and actions that formed the basis of his state tort law claims. Petitioner states that "Hall was going to . . . 'hang' Gooden in court. (Smith Dep. at 24; JA 159)" (Petition, pp. 22-23). Petitioner's cite to the joint appendix reveals that Hall never made any such statement, it was merely Petitioner's counsel characterization of Smith's impression. In fact, when asked by Petitioner's counsel if Hall told Smith that he was going to "hang" Petitioner in Court, Smith stated "No sir, I don't think so. I think it was more or less his attitude that lead [sic] me to believe that." (JA1 p. 159). Petitioner also states that Hall made defamatory remarks about him and that those defamatory remarks violated his constitutional rights. As the Fourth Circuit stated "[s]ince the district court found evidence, largely uncontradicted, that [Petitioner] had a reputation in the community for being a homosexual, the record does not support a cause of action for defamation." (Petition, p. 22A). If there was no evidence of the tort of defamation, surely the same lack of evidence does rise to a constitutional violation.

Petitioner attempted to advance a totality of conduct argument. However, almost every argument advanced by Petitioner pertains to Defendant Baysdon individually for which Petitioner has recovered over $55,000. Yet, Petitioner tries to bootstrap upon Baysdon's tortious conduct to hold the town liable for the same actions now characterized as constitutional claims. However, "nothing in the language of the due process clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Co. Dept. of Social Services*, ___ U.S. ____, 109 S.Ct. 998, 1003, 103 L.Ed. 2d 249 (1989). As one example of Petitioner's "totality" argument, he states that Baysdon used an "electronic eavesdropping device", and Hall observed and supervised Baysdon's activities. (Petition, p. 39). Again, there is no support in the record for these allegations.

Petitioner brought many claims all of which have been dismissed. Petitioner now asserts that this Court should grant his petition for writ of certiorari on his substantive due process claim. In support of his petition, Petitioner has altered his claims and the

underlying facts. As the lower courts' noted, Petitioner's substantive due process claim was based on the condemnation and denial of a building permit. Petitioner's assertion of a liberty interest violation was not pleaded in his Complaint and if it was, it was not deprived. (Petition, p. 40A). In order to establish a substantive due process claim for derivation of his property interest, Petitioner must present evidence of a property interest in the Building and in a building permit. After each court considered and rejected Petitioner's arguments, he misstates and mischaracterizes the facts to attempt to create a substantive due process claim. In essence, Petitioner asserts that actions that were not sufficient to go to the jury on an intentional infliction of emotional distress claim, a mere tort claim, are somehow sufficient to constitute a violation of substantive due process.

STATUTORY PROVISION INVOLVED

The following statutory provision is relevant to this case and set forth as follows:

42 U.S.C. § 1983:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REASONS FOR DENYING THE WRIT

Petitioner states that his claims are limited to substantive due process and that the Fourth Circuit and the District Court failed to address adequately his claims. (Petition, p. 4). These claims are purportedly based on Petitioner's version of the facts. Most of these claims now advanced by Petitioner were raised for the first time on appeal and were nevertheless incomprehensible, therefore, it was unnecessary for the lower courts to address them.

I. THERE ARE NO GROUNDS FOR ISSUANCE OF A WRIT OF CERTIORARI

As stated in Rule 10 of the Supreme Court Rules a petition for a writ of certiorari will be granted only for special and important reasons such as a conflict in the circuits or an important

question of federal law which should be settled by this Court. Petitioner asserts that there is a division among the circuits with respect to the application of substantive due process and an uncertain standard of proof in substantive due process claims which creates an important federal question. Petitioner fails to support these conclusions.

The application of substantive due process in the context of denial of building permits and zoning disputes has been consistent within the circuits. The analysis, whether explicitly stated or implicit from the facts, is aptly set forth in *Brady v. Colchester,* 863 F.2d 205 (2d Cir. 1988). In *Brady*, the owners of a building brought a civil rights suit against the town for procedural and substantive due process violations alleging political animus for the town's denial of a permit. The *Brady* court set forth a two-step analysis to determine whether a substantive due process violation had occurred.

First, the court stated that the plaintiffs must have a protected property interest within the meaning of the fourteenth amendment. *Brady*, 863 F.2d at 211. Just as the trial court in this case relied on the Fourth Circuit's pronouncement in *Scott v. Greenville Co.*, 716 F.2d 1409 (4th Cir. 1983), the *Brady* court also relied on *Scott* and stated in the context of plaintiffs' substantive due process claim:

> In the context of a zoning dispute, to state a claim under the fourteenth amendment for deprivation of "property" without due process of law a person must establish that he had a valid "property interest" in some benefit that was protectable under the fourteenth amendment at the time he was deprived of the benefit.

Brady, 863 F.2d at 211-12, citing *Scott*, 716 F.2d at 1418.

Second, if the threshold issue if answered affirmatively, only then is the conduct of the defendant reviewed. The *Brady* court stated:

> In zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions.

Brady, 863 F.2d at 215, and numerous cases cited therein (emphasis added). Most cases do not address the first step in the analysis because it is obviously met when the plaintiff is the property owner, so the focus is typically in the second step.

Petitioner claims there is a conflict in the circuits with respect to whether a property interest is required to bring a substantive due process claim based on a denial of property. In essence, Petitioner states that some circuits do not use the first step of the analysis. To the contrary, in the other circuits, the property owners were the plaintiffs. Thus, in those cases there was no reason to address the first step and the issue was the second step, substantive due process. This reasoning is consistently applied in *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983), *Brady v. Colchester*, 863 F.2d 205 (2d Cir. 1988), *Bello v. Walker*, 840 F.2d 1124, *cert. den.*, __ U.S. ___, 109 S.Ct. 176, 102 L.Ed.2d 145 (3d Cir. 1988), *Scott v. Greenville Co.*, 716 F.2d 1409 (4th Cir. 1983), *Shelton v. City of College Station*, 754 F.2d 1251 (5th Cir. 1985), *Harding v. County of Door*, 870 F.2d 430 (7th Cir. 1989), *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), *Marine One, Inc. v. Manatee Co.*, 877 F.2d 892 (11th Cir. 1989) and *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1987). Only the Sixth and Eighth, and Tenth Circuits have not addressed this issue. In the Eighth Circuit, the court stated that whether a denial of a permit can be a substantive due process violation is an open question. *Lemke v. Cass County, Nebraska*, 846 F.2d 469 (8th Cir. 1987)(en banc). In every case a proper person challenged the decision regarding the property.

Petitioner argues that the First Circuit is hostile to substantive due process claims. In *Chiplin*, the First Circuit stated that a mere denial of a permit did not rise to constitutional proportions yet recognized that additional factors may implicate constitutional concerns. *Chiplin*, 712 F.2d at 1527. Thus, the First Circuit recognizes a valid claim.

A proper person in all cases cited above was the property owner who had complied with all the statutory requirements for a permit to issue. In *Scott*, the proper person was a land developer who had an option to purchase the land and had complied with all requirements for a permit. *Scott*, 716 F.2d at 1412. Here, it is

undisputed that Petitioner was not the owner nor did he comply with the statutory requirements for a permit. As the Fourth Circuit Court of Appeals stated:

> [i]t simply cannot be argued that Hall was "arbitrary and capricious" in denying the permit, see *Marks v. City of Chesapeake*, 883 F.2d 308, 310-11 (4th Cir. 1989), since Plaintiff had no legitimate claim to it. Allegations of a denial of due process ring hollow unless plaintiff possesses some underlying right of interest of which he could be deprived.

(Fourth Circuit Court of Appeals Opinion, Petition, p. 12A)

Petitioner relies upon *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988) for his argument that an important federal question exists and review by this Court is necessary. He states that the lower courts need guidance on the standards to be applied in substantive due process actions. In *Silverman*, the D.C. Circuit was not addressing a denial of a building permit, and in any event the plaintiffs were the property owners. *Silverman*, 845 F.2d 1077. Nevertheless, the standard of review for substantive due process in this context has been enunciated many times by this Court. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797 (1974)(mere rational relationship test applies to zoning dispute). This standard has been applied in the circuits when deciding a substantive due process issue in this context. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988)(deny substantive due process only if actions are irrational). Therefore, there is no need for further guidance by this Court and there is no important federal question in need of review.

II. PETITIONER DID NOT POSSESS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THE BUILDING

The substantive due process issue is not addressed by the lower courts because Petitioner could not overcome the threshold

issue of whether he had a constitutionally protected property interest in the Building sufficient to allow him to challenge the condemnation or have any entitlement to a building permit. Petitioner's misstatements of fact to create an impression of arbitrary conduct is not relevant because that issue was not reached because Petitioner failed to overcome the threshold issue.

The fourteenth amendment of the United States Constitution states that ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1 cl. 3 (emphasis added). Petitioner asserts that Respondents violated his substantive due process rights by condemning the Building, denying him a permit to work on the Building and by engaging in conduct shocking to the conscience of the Court. However, Petitioner did not own the Building when it was condemned nor when he requested a building permit. The Code provides Petitioner with a right to appeal any decision by the local building inspector, a right which Petitioner did not pursue. N.C.S.B.C. § 106.2 (1984). Petitioner knew that a permit would issue upon submission of the proper plans and specifications. N.C.S.B.C. § 105.4 (1984). Petitioner did not plead a violation of his liberty interest and even if he had, Respondents never deprived Petitioner of his career as an actor or his opportunity to operate a restaurant elsewhere. The use of the word "deprived" in the fourteenth amendment logically requires a person to have a property interest before a State can commit a deprivation of that interest. See *Brady v. Colchester*, 863 F.2d 205 (2d Cir. 1988).

Petitioner suffered no deprivation by virtue of the condemnation or the denial of the building permit. The Building was owned by Petitioner's mother. Petitioner produces no indicia of authority or agency from the owner to contest the condemnation. Property interests are created and defined by existing rules or understandings that stem from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). North Carolina's condemnation statute sets out only the statutory rights of the owner of a building. N.C.G.S. § 160A-428 (1987). North Carolina has held that a complaint was properly dismissed when the plaintiff failed to allege that she was the owner of property affected by the building inspector's decision. *Pigford v. Board of Adjustment*, 49

N.C. App. 181, 182-83, 270 S.E.2d 535, 536 (1980), *disc. rev. den.* and *app. dismissed*, 301 N.C. 722, 274 S.E.2d 230 (1981).

Petitioner alleged that his property interest is based on his status as a lessee, but Petitioner is unable to provide any evidence of a lease. In addition, Petitioner is unable to provide any state law that grants a property interest to a lessee. In North Carolina, the essential terms of a valid lease are parties (lessor and lessee), the real estate demised, the term of the lease, and the consideration or rent. *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 146, 139 S.E.2d 362, 367 (1964). Petitioner failed to provide any evidence of the term of the lease or the consideration paid for the lease. Thus, Petitioner has at best only a month-to-month tenancy. See *Choate Realty Co. v. Justice*, 212 N.C. 523, 525, 193 S.E. 817, 819 (1937) (lease of uncertain duration is void and creates at the most a tenancy at will). However, a month-to-month tenancy does not create a property interest. *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 613, 322 S.E.2d 655, 657 (1984). Furthermore, in the analogous case of *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 371 S.E.2d 302 (1988), the North Carolina Court of Appeals stated that only the owner of the property can challenge a building inspector's decision. *Id.* at 239, 371 S.E.2d at 304-305 (emphasis added). Petitioner was, therefore, without standing to challenge the condemnation or the denial of the request for a building permit. See *Eaton v. City of Solon*, 598 F. Supp. 1505 (N.D. Ohio 1984).

The condemnation was rescinded by the Town Board on April 14, 1986 prior to the filing of this action, June 15, 1987. Article III of the Constitution requires the courts to limit review to actual cases and controversies. U.S. CONST. art. III, § 2. The controversy must exist through all stages of the proceedings, including the appellate stages. *United States v. Munsingwear*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). A case becomes moot when the allegedly wrongful behavior ends before the review. *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972). Here, the condemnation was rescinded one year and two months before the lawsuit was filed. Therefore, even if Petitioner had a property interest in the Building and the condemnation deprived Petitioner of that property interest, the condemnation was rescinded over a

year before this lawsuit was filed. The entire condemnation issue is moot.[2]

In further evaluating Petitioner's substantive due process claim, the trial court properly determined that the Petitioner had no protectable property interest in the building permit he sought sufficient to give rise to rights under the due process clause of the fourteenth amendment. *Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983). Petitioner miscites numerous cases in arguing that a property interest is not required for due process protection. For example, Petitioner relies on *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) and *Bello v. Walker*, 840 F.2d 1124, *cert. den.* ___ U.S. ___, 109 S.Ct. 176, 102 L.Ed.2d 145 (3d Cir. 1988) to assert that a property interest is not necessary to bring a substantive due process claim for deprivation of a property interest. Petitioner argues that the courts in *Bateson* and *Bello* found a substantive due process violation without finding a procedural due process violation. In both *Bateson* and *Bello* the permit applicant had a property interest in the permit by owning the property and complying with the requisite statutes for the permit to issue. A procedural due process claim is for the deprivation of property without due process of law whereas a substantive due process claim is for merely the deprivation of property. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 678, 88 L.Ed.2d 662 (1986) (Stevens, J. concurring). Petitioner tries to persuade this Court to sidestep the threshold issue articulated in *Brady*, and *Marine One*, and implied in *Chiplin*, *Bello*, *Shelton*, *Harding*, *Bateson*, *Silverman*, and *Scott*. He argues that a substantive due process claim does not require a property interest. However, every circuit that has addressed this issue and in all cases cited by Petitioner, a person with a legitimate claim of entitlement such as the property owner or someone that has complied with the requirements for a permit to issue, has brought the claim. Therefore, a property interest existed in the claimant in all of these cases.

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[2] Any cause of action based on the condemnation of September 15, 1982 would be barred by the three year statute of limitations prior to the institution of this action on June 15, 1987. Plaintiff's rights, if any, must therefore be grounded on the alleged acts of the Defendants committed on or after June 15, 1984.

If Petitioner felt that he was unjustly denied a building permit, he had an opportunity to appeal Hall's decision to the North Carolina Commissioner of Insurance. N.C.S.B.C. § 106.2 (1984). The right to appeal is automatic and without cost. Additionally, Petitioner could have simply submitted the plans and specifications required for a permit to issue or brought a state court action. Petitioner's own expert, Bob Pritchard, stated that if a building is over 50% damaged, the only way you can repair it is upon submission of plans and specifications to the local inspection department. (Pritchard Dep. at 20). As the Second Circuit Court of Appeals stated in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985), a federal court should not sit as a zoning board of appeals.

Even if Petitioner had a property interest, the condemnation of the Building and denial of a building permit were not arbitrary and did not affect the Petitioner. Petitioner's attempt to create a scenario showing arbitrary or capricious conduct ignores the undisputed facts. Hall, and three other independent inspectors determined the Building to be at least 50% damaged. See N.C.S.B.C. § 101.6(d)(2)(1984). The local inspector has the discretion and authority to condemn, and the standard for condemnation is noncompliance with the code or an unsafe building. N.C.G.S. § 160A-426 (1987); N.C.S.B.C. § 105.12 (1984). Based on the "50% damaged" provision, his experience and his knowledge that the Building was unsafe and not in compliance with the Code, Hall condemned the Building. Further, the Building was used as a restaurant and most recently Petitioner used the Building to show videotapes to minors and young adults. Considering the past use and the intended use of the Building, Hall used his best judgment to condemn it for the protection of all concerned.

Petitioner asserts that his expert hired for this lawsuit, Bob Pritchard, evaluated the damage at approximately 20%. Petitioner's reliance on his hired inspector was irrelevant because his expert had not reached a final opinion as of the date of his deposition which was the evidence submitted to the District Court in opposition to Respondent's motion for summary judgment. (Pritchard Dep. at 10-11). At best, Petitioner's expert found the Building to be approximately 40% fire damaged. (Pritchard

Dep. at 62). However, the standard was not fire damage, it was total damage. See N.C.S.B.C. §101.6(d)(2)(1984). Nevertheless, the issue was whether the condemnation was arbitrary not which inspector was most accurate. Hall's conclusion was supported by an inspector selected by Petitioner's father, one independent inspector, one impartial umpire and the insurance settlement itself. Clearly, the condemnation was not arbitrary or capricious.

III. THERE ARE NO LIBERTY INTEREST ISSUES

Before the Court can reach the issue of how an interest was allegedly deprived, it must first determine if Petitioner had an interest that could be deprived. Petitioner had no property interest in the Building so the trial court granted summary judgment. On appeal, Petitioner attempted to obfuscate his claim by substituting a deprivation of liberty interest analysis for a deprivation of a property interest claim. Petitioner repeatedly cited cases where a substantive due process violation was found, but these cases uniformly applied to a deprivation of a liberty interest not a deprivation of property interest. *e.g. Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980)(corporeal punishment by public school officials).

Since Petitioner's substitution of a liberty interest analysis for a property interest claim failed in the Court of Appeals, he now asserts a liberty interest violation. *e.g. Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990)(discharge of police officer). Petitioner had not pleaded a liberty interest violation in his complaint, (Order at 9, n.4; JA 394). The lower courts properly determined that even if Petitioner had pleaded a liberty interest, there was no allegation that Petitioner was denied the opportunity to continue his career as an actor or in the restaurant business elsewhere in Clarkton or at the location of the Building upon properly applying for a building permit. *See Bishop v. Wood*. 426 U.S. 341, 347, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976) (a person is not deprived of his liberty interest when he remains free to seek other employment).

Petitioner now claims that Respondents' conduct shocks the conscience of the Court. To support this claim, Petitioner recapitulates all of his dismissed state and constitutional claims, including procedural due process, equal protection, and

unreasonable seizure, under his substantive due process claim. In effect, Petitioner argues that none of these claims individually rise to a constitutional violation yet somehow together they create a constitutional violation. As the Fourth Circuit stated "[t]he equal protection claim amounts to little more than a rehash of plaintiff's due process contentions." (Petition, p. 12a).

Petitioner's equal protection claim failed because there was no competent evidence that Respondents treated Petitioner differently from any similarly situated person. In fact, the town never dealt with a similar situation. (Hall Dep. Vol. II at 96-97). The Building is woodframe and located in the primary fire district of Clarkton. (Hall Dep. Vol. I at 30). As such, special provisions of the North Carolina State Building Code apply to the Building. N.C.S.B.C. §§ 105.3 and 302.4. Petitioner repeatedly refers to the other buildings in and around Clarkton. However, Petitioner presented no evidence that any other building in Clarkton is woodframe and within the primary fire district. Thus, there is no one similarly situated to Petitioner, and he has no equal protection claim.

Petitioner contends that his arrest for violation of North Carolina General Statute § 160A-417 constituted an unreasonable seizure and consequently, violated the fourth amendment. Petitioner was arrested for failing to obtain a permit to move or alter a building in the fire district and violating a stop order. N.C.S.B.C. §§ 105.2, 105.3 and 105.8 (1984).

The undisputed evidence revealed that the Building Code required a special permit to move or alter a woodframe building located in the fire district. N.C.S.B.C. § 302.4 (1984). The Building was located in the primary fire district. (Hall Dep. Vol. 1 at 30). Hall, the town building inspector, was informed that Petitioner was moving parts of the Building across the road. (Hall Dep. Vol. I at 77). Petitioner did not have a special permit. (Gooden Dep. Vol. III at 18). To enforce the Code, the building inspector has the authority to issue a stop order and bring judicial action. N.C.S.B.C. §§ 105.2 and 105.8 (1984). Pursuant to the Building Code, Hall ordered Petitioner to stop work and sought an arrest warrant. Further, Petitioner admitted that he moved parts of the Building without a permit. (Gooden Dep. Vol. III at 18). The charges were dismissed because Hall did not actually see Petitioner

move the parts and because the statutory section was incorrectly cited on the arrest warrant. (Hall Dep. Vol. I at 78; Hicks Dep. at 21). Thus, Petitioner's claims are without basis and his petition should be denied.

IV. PETITIONER DID NOT ALLEGE ANY ACTIONS THAT WERE EXECUTED IN ACCORDANCE WITH THE TOWN'S POLICY OR CUSTOM.

Petitioner styled his action as one for constitutional violations and 42 U.S.C. § 1983 violations. In any § 1983 action, a Petitioner must prove two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprives plaintiff of rights, privileges or immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), overruled on other grounds, 474 U.S. 327, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986). This issue has not been reached by the lower courts because there was no conduct by any Respondent that deprived the Petitioner of rights, privileges or immunities secured by the Constitution or the laws of the United States.

While a municipality may be liable under § 1983 for certain actions, the Town of Clarkton is not liable for any of the individual Respondent's acts which Petitioner alleged deprived him of his constitutional rights. These individual Respondents were not acting under the policy or custom of the Town, and thus, did not subject it to § 1983 liability. A municipality may be liable under § 1983 only for acts which the municipality itself is actually responsible. Congress did not intend to make all torts by state officials federal claims. *Paul v. Davis*, 424 U.S. 693, 698-99, 96 S.Ct. 1155, 1159, 47 L.Ed.2d 405, *reh. den.*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

When only a single occasion of alleged constitutional violations is at issue, three other requirements were set out by the Supreme Court for finding a municipal policy unconstitutional. They are as follows: (1) only municipal officials who have final policy making authority may by their actions subject the municipality to § 1983 liability, (2) whether a particular official has

final policy making authority is a question of state law, and (3) the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 806 (1986).

In the case at bar, the individuals who made the decisions that Petitioner alleged violated his constitutional rights did not have final policy making authority. The Town Board of Commissioners is the final policy maker because only it is authorized to adopt ordinances affecting the Town of Clarkton. See CLARKTON, N.C., ORDINANCES ch. 1 (1954).

It is clear in this case that the Board of Commissioners exercised the final policymaking authority in the Town of Clarkton. Not only did it have the power to review condemnation decisions, it suspended the building inspector's power of condemnation and rescinded the condemnation of the Building before this lawsuit was filed. North Carolina's Commissioner of Insurance had final policymaking authority with respect to the building inspector's issuance of building permits, and North Carolina is not a party to this lawsuit. Thus, Hall had no final policymaking authorities, and his actions do not subject the Town to § 1983 liability.

Petitioner has failed to show the existence of the essential elements of a § 1983 action. First, there has been no showing of conduct that deprived the Petitioner of his rights or privileges secured by the constitution. Second, even if the court had found that any of Petitioner's subsequent claims should have survived summary judgment, the claim under § 1983 would still be precluded by Petitioner's failure to show any affirmative link or any policy adopted by officials of the Town of Clarkton.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted, this the 29th day of August, 1990.

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By /s/ Hoyt G. Tessener
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